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No. 16072 ✓

VOL. 3087

United States
Court of Appeals
for the Ninth Circuit

See: Vol.
3077

TIDEWATER ASSOCIATED OIL COMPANY,
a corporation, Appellant,
vs.

NORTHWEST CASUALTY COMPANY, a cor-
poration, Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

FILED

SEP 3 - 1958

PAUL P. O'BRIEN, CLERK

No. 16072

United States
Court of Appeals
for the Ninth Circuit

TIDEWATER ASSOCIATED OIL COMPANY,
a corporation, Appellant,

vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Portland 4, Oregon,

For Appellant.

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WM. C. RALSTON,
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Public Service Building,
Portland 4, Oregon,

LEO LEVENSON,
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Portland 4, Oregon,

For Appellee.

In The Circuit Court of the State of Oregon
For The County of Multnomah

No. 239,354

TIDEWATER ASSOCIATED OIL COMPANY,
a Delaware corporation, Plaintiff,

vs.

NORTHWEST CASUALTY COMPANY, a Wash-
ington corporation, Defendant.

COMPLAINT

Plaintiff complains, and for cause of action against the defendant, alleges:

I.

That at all times herein mentioned, Tidewater Associated Oil Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware and licensed to carry on a gasoline and oil distributing business within the State of Oregon. That at all times herein mentioned Northwest Casualty Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Washington and licensed to carry on a general insurance business within the State of Oregon.

II.

That on or about the 9th day of January, 1953, defendant, Northwest Casualty Company of Seattle, Washington, in consideration of a premium

and policy fee in the sum of \$174.04, wrote, issued and delivered a certain comprehensive public liability Policy No. 880-7277, wherein Plaintiff was an additional named insured and wherein defendant agreed to pay on behalf of insured all sums which Plaintiff would be obligated to pay by reason of liability imposed upon Plaintiff by law for damages because of bodily injury not to exceed \$25,000.00 for each person and \$50,000.00 for each occurrence. That said policy was in full force and effect at all times herein mentioned.

III.

That on the 12th day of September, 1955, there was served upon Plaintiff a summons and complaint entitled "Ruth Buffington, Plaintiff, vs. Wm. V. Sherer, Frank Moore, Jr., and Tidewater Associated Oil Company, a corporation, Defendants", being Case No. 19175 in the Circuit Court of the State of Oregon in and for the County of Coos, copy of which is attached hereto, marked Exhibit A. and by this reference made a part and parcel hereof.

IV.

That on or about January 25, 1956, Plaintiff by letter tendered the defense of said action to defendant under and in accordance with the terms of said policy of insurance hereinabove referred. That in reply to said letter, defendant, by letter dated January 27, 1956, denied liability under said policy, which said letter is attached hereto, marked Exhibit B and by this reference made a part and

parcel hereof. That by reason thereof, Plaintiff was required to, and did procure counsel to defend said action, and because of plaintiff's inability to defend under the acts of negligence set forth in said complaint, on advice of counsel did fully compromise and settle said action on the 28th day of June, 1956, by paying to the Plaintiff therein, Ruth Buffington and her husband, Robert Buffington, the full sum of \$15,000.00 which Plaintiff herein alleges to be a reasonable, fair and necessary sum for the settlement thereof.

V.

That by reason of the refusal of defendant to accept liability in accordance with the terms of said policy, plaintiff has been damaged in the sum of \$15,000.00.

VI.

That more than six months has elapsed since the date of the tender of said above mentioned action to defendant and a reasonable attorney's fee to be allowed herein would be the sum of \$3,500.00.

For a Second Cause of Action, Plaintiff alleges:

I.

Realleges Paragraphs I, II and III of its first cause of action and by this reference incorporates the same herein as though fully set forth hereinafter.

II.

That on or about January 25, 1956, plaintiff, by letter, tendered to defendant the defense of said

action hereinabove referred in accordance with the terms of said policy of insurance referred to above. That in reply to said letter defendant, by letter dated January 27, 1956, attached hereto marked Exhibit B and by this reference made a part and parcel hereof, refused to defend said action. That by reason thereof, plaintiff was required to, and did, procure counsel to defend said action and plaintiff was obligated to, and did, pay all costs incurred in said action amounting to \$260.73, together with a reasonable fee for its attorneys in the sum of \$750.00, to plaintiff's damage in the sum of \$1010.73.

III.

That more than six months has elapsed since the date of this tender of said above mentioned action to defend and a reasonable attorney's fee to be allowed herein would be the sum of \$700.00.

Wherefore, Plaintiff prays for judgment against defendant in the sum of \$15,000.00 on its first cause of action, together with the sum of \$3500.00 as and for a reasonable attorney's fee herein; and on its second cause of action, for the sum of \$1010.73, together with the sum of \$700.00 as and for a reasonable attorney's fee herein; together with Plaintiff's costs and disbursements in this cause incurred.

WHEELOCK & RICHARDSON,
Attorneys for Plaintiff.

EXHIBIT "A"

In The Circuit Court of the State of Oregon
In and For The County of Coos.

Case No. 19175

RUTH BUFFINGTON, Plaintiff,

vs.

WM. V. SHERER, FRANK MOORE, JR., and
TIDE WATER ASSOCIATED OIL COM-
PANY, a corporation, Defendants.

Action at Law

COMPLAINT

Comes now the Plaintiff above named and for her first cause of action against the Defendants above named complains and alleges as follows:

I.

That the Defendant Tide Water Associated Oil Company is a corporation duly organized and existing under the laws of the State of Delaware, and licensed to do business in the State of Oregon.

II.

That at all times in this Complaint mentioned, the Defendants were engaged in the sale, delivery, and distribution of gasoline, stove oil and other petroleum products in Bandon, Coos County, Oregon, and the vicinity thereof.

Exhibit "A"—(Continued)

III.

That at all times in Plaintiff's Complaint mentioned, the Defendants Wm. V. Sherer and Frank Moore, Jr., were the agents, servants and employes of the Defendant Tide Water Associated Oil Company, a corporation, and at all times in this Complaint mentioned were acting within the due course and scope of their employment as such agents, servants and employes.

IV.

That on or about the 3rd day of December, 1953, and for some time prior thereto, Plaintiff, together with her husband and three children, maintained a residence near Bandon in Coos County, Oregon, and as a part of the furnishings in said home had installed and in use therein an oil heating stove for the living room area of said house, and a wood cooking stove for cooking purposes located in the kitchen of said house; that in order to furnish fuel to said oil heating stove a small pipe ran from said heating stove to a tank located outside said house in which stove oil was stored, and which stove oil ran from said tank into the said heating stove when required to maintain a fire therein.

V.

That as a part of Plaintiff's normal and regular household duties she was required to start a fire in the kitchen stove heretofore mentioned, and in connection therewith kept a can for the sole and ex-

Exhibit "A"—(Continued)

clusive purpose of keeping therein a small quantity of stove oil, a small amount of which stove oil Plaintiff would pour upon the stove wood located in the fire box of said stove to facilitate the starting of a fire therein.

VI.

That on or about the 1st day of December, 1953, an order was placed with the Defendant Tide Water Associated Oil Company for the delivery to the Plaintiff's home, stove oil of the kind normally and usually used in an oil heating stove, and with a flash point of approximately 150° Fahrenheit; that on or about the 2nd day of December, 1953, Defendant Frank Moore, Jr., drove to Plaintiff's home for the purpose of delivering thereto stove oil as had been previously ordered from the Defendant Tide Water Associated Oil Company; that the truck in which said stove oil was delivered had attached thereto as a part thereof a tank divided into compartments; one such compartment contained stove oil; other compartments of said tank contained highly explosive and inflammable petroleum products normally and customarily termed regular gasoline and ethyl gasoline.

VII.

That upon the arrival of said Defendant Frank Moore, Jr., Plaintiff obtained the can heretofore mentioned and requested said Defendant Frank Moore, Jr., to place a small quantity of stove oil, as ordered, therein, and that she desired to use

Exhibit "A"—(Continued)

the same to facilitate the starting of kitchen stove fires. Thereupon, said Defendants took the hose located upon said truck and poured a petroleum product represented by said Defendants to be stove oil, as ordered, in said can. Thereupon, Plaintiff placed said can and said contents as placed therein by Defendants, upon the back porch of her home for later use in starting kitchen stove fires.

VIII.

That on or about the hour of 8:00 o'clock A.M. on the 3rd day of December, 1953, the Plaintiff was required to start a fire in the wood stove hereinbefore mentioned, placed some wood therein, obtained the can which contained only the petroleum product delivered by Defendants as hereinbefore mentioned, and which Plaintiff had placed on the back porch, and which had been represented to her as containing stove oil, struck a match and placed the same beneath the wood at the end of the fire box farthest from the front of the stove, and commenced to pour a small quantity of the petroleum product from said can upon the wood at the front end of the fire box of the stove; that simultaneously, with the first small particle of the petroleum product coming in contact with the wood at the front end of the fire box of said stove, the petroleum product from said can ignited and flamed with great force and violence, and the flame therefrom simultaneously travelled up and into the can held by the Plaintiff thereupon, the contents of the can

Exhibit "A"—(Continued)

which had been delivered by Defendants and represented as stove oil, exploded with great force and violence, the force of said explosion propelling said can against Plaintiff's chest and the impact therefrom hurled the Plaintiff backwards for several feet and knocked her to the kitchen floor; and thereupon, fire from the petroleum product in said can, and which had been delivered by Defendants and represented as stove oil, almost completely enveloped Plaintiff with great fury and with intense heat, and thereby causing Plaintiff to be severely burned and to sustain injuries as hereinbefore set forth.

IX.

That Plaintiff's injuries heretofore mentioned and as hereinafter set forth were proximately caused by the carelessness and negligence of the Defendants, in the following particulars, to-wit:

(a) In furnishing to Plaintiff a petroleum product other than stove oil, or in furnishing another petroleum product mixed with stove oil, either of which when used for the purpose for which the Defendants knew it was going to be used, was highly explosive and would ignite with great fury and violence, was extremely dangerous and under no circumstances adaptable for the use for which Plaintiff desired said petroleum product, all of which was known to the Defendants, or with reasonable care and caution should have been known to the Defendants.

(b) That Defendants pumped from the only hose

Exhibit "A"—(Continued)

located on the truck used in the delivery of said petroleum product and into plaintiff's can a petroleum product which Defendants represented to be stove oil, when Defendants had immediately prior thereto pumped through the same hose gasoline, and when said Defendants knew, or in the exercise of reasonable care should have known, that said hose still contained gasoline and that said gasoline would be the first petroleum product to go into said can from said hose, and when used for the purpose for which Plaintiff intended to use the same, whether entirely gasoline or a mixture of gasoline and stove oil would constitute a highly explosive and dangerous material not suited or intended for the use contemplated by Plaintiff, and likely to cause serious injury to Plaintiff.

(c) In failing to pump a sufficient quantity of petroleum product into the stove oil storage tank, thereby removing all trace of gasoline from said hose, and thereby eliminating the possibility that said hose contained any gasoline prior to placing any stove oil in the can for Plaintiff.

(d) In failing to have and maintain upon said truck a separate hose to be used exclusively for stove oil, and thereby preventing a highly combustible, explosive, inflammable and dangerous product such as gasoline, or a highly combustible, explosive, inflammable and dangerous product such as a mixture of gasoline and stove oil, being delivered to a person for the purpose of facilitating the starting of kitchen stove fires, and particularly,

Exhibit "A"—(Continued)

to this Plaintiff when the same was represented to her to be entirely stove oil.

X.

That as a proximate result of the negligence of the Defendants as hereinbefore alleged, Plaintiff sustained third degree burns to her right hand, right forearm, posterior aspects of the waist, buttocks, thighs and legs, which required that Plaintiff be confined in a hospital from the 3rd day of December, 1953, continuously until the 3rd day of April, 1954; that Plaintiff has suffered great pain and mental anguish as a result of said injuries; that Plaintiff was required to receive frequent blood transfusions, as well as intravenous plasma and serum albumen; that during the time of Plaintiff's hospitalization she was required to undergo four separate skin grafting operations to cover the burned area; that by reason of said burns she has a keloid formation over the right hip, right groin and on the dorsum of the right hand and wrist; that Plaintiff will be required to undergo further reconstructive surgery on her right hand to alleviate the limited motion thereof by reason of said burns; that Plaintiff has sustained a permanent limitation of the movement of the right hand and wrist and a weakening condition of the right hand, which will prevent her from having a normal use thereof. The scarring of the Plaintiff's body by said burns in the areas heretofore described are permanent and Plaintiff will be severely scarred

Exhibit "A"—(Continued)

for the remainder of her life; that by reason of said injuries Plaintiff has been generally damaged in the sum of \$100,000.00.

XI.

That as a proximate result of the negligence of the Defendants and the resulting injuries as heretofore alleged by Plaintiff, Plaintiff has incurred hospital bills in the sum of \$3,199.00 and doctor bills in the sum of \$600.00.

Plaintiff, for her second cause of action against Defendants complains and alleges as follows:

I.

Re-alleges Paragraphs numbered I, II, III, IV, and V of Plaintiff's first cause of action, as if specifically set forth herein.

II.

That upon the arrival of the Defendant Frank Moore, Jr. Plaintiff obtained the can heretofore mentioned and advised said Defendants that she required a small portion of the stove oil purchased for the purpose of facilitating the starting of kitchen stove fire, and thereupon, said Defendants took the hose located upon said truck, poured into said can the petroleum product which was represented by the said Defendants to be stove oil, and with a flash point of approximately 150° Fahrenheit; thereupon, Plaintiff placed said can and con-

Exhibit "A"—(Continued)

tents upon the back porch of her home, for later use for starting kitchen stove fires.

III.

That at the time of the purchase of the petroleum product, a portion of which was placed in the can at the request of the Plaintiff, the Defendants represented and impliedly warranted that the product placed in said can was stove oil, and was fit, safe and proper for the use which Plaintiff intended to employ said petroleum product, and Plaintiff relied upon the implied warranty of the Defendants that the said petroleum product was stove oil and that it was fit for the purpose for which she intended to employ the same, and had no notice that it was otherwise; however, at or about the hour of 8:00 o'clock A.M. on the 3rd day of December, 1953, Plaintiff was required to start a fire in the wood stove heretofore mentioned, placed some wood therein, obtained the can containing the same contents heretofore mentioned, from the back porch, which she believed and which had been represented to her as containing stove oil, and which Defendants impliedly warranted was safe and fit for the use to which she intended to employ it, struck a match and placed the same beneath the wood within and at one end of the fire box of the said kitchen stove, and commenced to pour a small quantity of the said petroleum product from said can upon the wood at the other end of said fire box; that simultaneously, with the first small par-

Exhibit "A"—(Continued)

ticle of the petroleum product from the said can coming into contact with the said wood, the petroleum product from said can ignited and flamed with great force and violence, and the flame therefrom instantaneously traveled up and into the can held by Plaintiff, thereupon, a violent explosion occurred and said can was thrown with great force and violence by said explosion against Plaintiff's chest, the impact therefrom hurling Plaintiff backwards for several feet and knocking her to the kitchen floor; thereupon, fire from the petroleum product in said can almost completely enveloped the Plaintiff with great fury and with intense heat, thereby causing Plaintiff to be severely burned and to sustain the injuries hereinafter set forth.

IV.

That the petroleum product sold by Defendants a portion of which was delivered into the can at the request of Plaintiff, and which Defendants impliedly warranted to be stove oil and safe and fit for the use for which Plaintiff intended to employ said petroleum product, was not stove oil, but gasoline, or a mixture of gasoline and stove oil, extremely dangerous, highly explosive and under no circumstances fit for or adaptable to the use for which Plaintiff desired to use the same, all of which was known to the Defendants, or with reasonable care and caution should have been known to the Defendants.

Exhibit "A"—(Continued)

V.

That by reason of the facts as heretofore alleged, the implied warranty to Plaintiff by Defendants was breached, and as a result thereof Plaintiff sustained third degree burns to her right hand, right forearm, posterior aspects of the waist, buttocks, thighs and legs, which required that Plaintiff be confined in a hospital from the 3rd day of December, 1953, continuously until the 3rd day of April, 1954; that Plaintiff has suffered great pain and mental anguish as a result of said injuries; that Plaintiff has required to receive frequent blood transfusions, as well as intravenous plasma and serum albumen; that during the time of Plaintiff's hospitalization, she was required to undergo four separate skin grafting operations to cover the burned area; that by reason of said burns, she has a keloid formation upon the right hip, right groin and upon the dorsum of the right hand and wrist, that Plaintiff will be required to undergo further reconstructive surgery on the right hand to alleviate the limited motion thereof by reason of said burns; that Plaintiff has sustained a permanent weakness and a permanent limitation of the movement of the right hand and wrist and the scarring of Plaintiff's body by said burns in the areas heretofore described are permanent and Plaintiff will be severely scarred for the remainder of her life, all to Plaintiff's damage in the amount of \$100,000.00.

Exhibit "A"—(Continued)

VI.

That by reason of the facts heretofore alleged, the implied warranty of the Defendants to Plaintiff was breached, and as a result thereof Plaintiff has incurred hospital bills in the sum of \$3,199.00, and doctor bills to date in the sum of \$600.00 all to Plaintiff's damage in the further sum of \$3,799.00.

Wherefore, Plaintiff demands judgment against the Defendants, and each of them, in the sum of \$100,000.00 general damages and the further sum of \$3,799.00, special damages, and for Plaintiff's costs and disbursements incurred herein.

BEDINGFIELD, GRANT &
BEDINGFIELD,
By D. J. GRANT, JR.,
Of Attorneys for Plaintiff.

[Title of Circuit Court and Cause.]

SUMMONS

To: Wm. V. Sherer, Frank Moore, Jr. and Tide
Water Associated Oil Company, a corporation,

In the Name of the State of Oregon: You are hereby required to appear and answer the Complaint filed against you in the above entitled action within ten days from the date of service of this summons upon you, if served within this county; or if served within any other County of this State,

Exhibit "A"—(Continued)

then within twenty days from the date of the service of this Summons upon you; or if served outside the State of Oregon but within the United States, then within four weeks from the date of the service of this Summons upon you; or if served outside of the United States and within a territory of the United States then within six weeks from the date of the service of this Summons upon you and if you fail so to answer, for want thereof the Plaintiff will take judgment against you in the sum of \$100,000.00 general damages and the further sum of \$3,799.00 special damages.

BEDINGFIELD, GRANT &

BEDINGFIELD,

By D. J. GRANT,

Attorneys for Plaintiff.

EXHIBIT "B"

Airmail

(Copy)

Northwestern Mutual Insurance Company

Incorporated 1901

Seattle, Washington

January 27, 1956

Oregon Claim Department, 234 Pacific Building,
Portland, Oregon, CA. 8-9554. F. H. Stuckrath,
Manager.

Tide Water Associated Oil Company
79 New Montgomery Street
San Francisco 20, California

20 *Tidewater Associated Oil Company vs.*

Att: Mr. A. D. Williams

Re: Policy #880-7277, William V. Sherer, Insured. Loss 12/3/53. Your file: 1.10-Bandon.

Gentlemen:

This will acknowledge receipt of your airmail letter dated January 25th.

In your letter you state the Tide Water Associated Oil Company is a named insured under the above policy, and since suit has been filed against your company, you are tendering the defense of the action to us, because you state our policy provides the primary coverage.

It is true that your company is named as an additional insured under the above policy in so far as your interest is concerned in the operation of Wm. V. Sherer. However, attached to the policy is an Exclusion of Product Liability Endorsement, and because of this endorsement, we have already denied coverage to Mr. Sherer. For the same reason, this letter will be notice to you that our coverage does not apply to this case, and for this reason, Northwest Casualty Company is not in a position to defend the action which has been brought against your company.

Yours very truly,

PORTLAND CLAIM
DEPARTMENT,
/s/ FLOYD H. STUCKRATH,
Floyd H. Stuckrath, Manager.

FHS:cm

cc: Home Office Claim Dept.

In the District Court of the United States
for the District of Oregon

Civil No. 9168

TIDEWATER ASSOCIATED OIL COMPANY,
a Delaware corporation, Plaintiff,

vs.

NORTHWEST CASUALTY COMPANY, a
Washington corporation, Defendant.

ANSWER

Comes now the defendant Northwestern Mutual Insurance Company and for answer to the complaint of the plaintiff, admits, denies and alleges as follows:

First Defense

I.

Answering the allegations of the first cause of action, this defendant admits Paragraphs I and III.

II.

Admits that on or about the 9th day of January, 1953, the defendant issued and delivered a comprehensive policy No. 880-7277, but denies the remainder of Paragraph II.

III.

Admits that on or about January 25, 1956, plaintiff tendered the defense in the Buffington case to the defendant and that by letter dated January

27, 1956, the defendant denied liability under the policy, but denies the remaining allegations in Paragraph IV.

IV.

Denies Paragraph V and VI.

Second Defense

I.

Answering the allegations in the second cause of action, defendant admits and denies the allegations of Paragraph I in the manner in which they have been admitted and denied in the first defense.

II.

Admits that on or about January 25, 1956, the plaintiff tendered the defense of the Buffington action to the defendant, and that on January 27, 1956, by letter, the defendant refused to defend said action, but denies the remaining allegations in said paragraph II.

III.

Denies the allegations of Paragraph III.

Third Defense

I.

Defendant moves for an order dismissing the within cause of action on the ground that the court lacks jurisdiction over the subject matter for the reason that the summons heretofore served on the defendant does not comply with the requirements of O.R.S. 15.050.

Fourth Defense

I.

That accompanying the Policy of Insurance No. 880-7277 issued by the defendant and as a part of said policy, and qualifying the provisions thereof, is a duly executed rider in the following language:

“Exclusion of Product Liability

Exclusions (A) and (B) below are applicable only when checked.

X (A) Bodily Injury

It is agreed that the policy does not apply to bodily injury, sickness or disease, including death at any time resulting therefrom.

X (B) Property Damage

It is agreed that the policy does not apply to injury to or destruction of property (including loss of use of such property):

if caused by the handling or use of, or the existence of any condition in goods or products manufactured, sold, handled or distributed by the Insured when the occurrence takes place away from premises owned, rented or controlled by the Insured, and after the Insured has relinquished possession of such goods or products to others or if caused by operations if the accident occurs after such operations have been completed or abandoned at the place of occurrence (other than pick up and delivery, and the existence of tools, uninstalled equipment, and abandoned or unused material); provided, operations shall not be deemed incomplete because improperly or defectively performed

or because further operations may be required pursuant to a service or maintenance agreement.

Subject, otherwise, to all the terms and conditions of the policy.

Attached to and hereby made a part of policy No. of the Northwest Casualty Company, of Seattle, Washington."

II.

That by reason of the foregoing rider and exclusion, no responsibility nor liability arose against the defendant by reason of the accident of December 3rd, 1953, and any expense of settlement incurred thereby.

Fifth Defense

I.

That if the plaintiff, or any one acting for it, made a settlement payment of \$15,000.00, it was done without knowledge, consent nor liability on the part of the defendant and was purely a volunteer payment for which the defendant is not liable.

Sixth Defense

I.

If the plaintiff incurred any attorney's fees or made other expenditures in defending or settling the claim arising out of the accident of December 3, 1953, such expenditure or charges were incurred by the plaintiff on its own volition and the defendant is not liable therefor.

Wherefore, having fully answered, the defendant prays for an order of this Court dismissing the complaint of the plaintiff and for its costs and disbursements.

/s/ WM. C. RALSTON,
Of Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed May 17, 1957.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

The above entitled cause came on regularly for pre-trial conference before the undersigned Judge of the above entitled Court on December 16, 1957. Plaintiff appeared by C. E. Wheelock, of its attorneys, and the Defendant appeared by William C. Ralston, of its attorneys. The parties, with the approval of the Court, agreed upon the following:

Statement of Facts Pertaining to First and Second Cause of Action

I.

That the above entitled action was commenced in the Circuit Court of the State of Oregon for the County of Multnomah, the title being the same and the case number in said Court being 239-354. That upon being served, Defendant filed a petition for removal of said case, together with a removal bond, copy of complaint, copy of summons and answer

attached thereto, all properly verified; that Plaintiff has not and will not object to said removal.

II.

Plaintiff is a citizen of the State of Delaware. Defendant is a citizen of the State of Washington. The amount in controversy, exclusive of interest and costs, exceeds the amount of \$3,000.00.

III.

Plaintiff is and at all times herein mentioned, was duly licensed to carry on a gasoline and oil distributing business within the State of Oregon, and Defendant is and at all times mentioned herein, was licensed to carry on a general insurance business within the State of Oregon.

IV.

Defendant, on or about the 9th day of January, 1953, issued and delivered a Comprehensive Public Liability policy bearing its No. 880-7277, to Wm. V. Sherer, to which there was attached a rider entitled, "Exclusion of Product Liability", and that Plaintiff was an additional named insured in said policy and that the limits of said policy were \$25,000.00 for each person, and \$50,000.00 for each occurrence as to bodily injury. That said policy was in full force and effect on December 3, 1953.

V.

That on the 12th day of September, 1955, there was served upon Plaintiff a summons and complaint, entitled, "Ruth Buffington, Plaintiff, vs.

Wm. V. Sherer, Frank Moore, Jr. and Tidewater Associated Oil Company, a corporation, Defendants", being case No. 19175 in the Circuit Court of the State of Oregon in and for the County of Coos.

VI.

Plaintiff, on or about January 25, 1956, tendered the defense of the above entitled case hereinafter referred to as the "Buffington Case" to the Defendant and that Defendant, by letter dated January 27, 1956, denied any liability under the terms of said policy.

VII.

That thereafter Plaintiff procured counsel, proceeded to defend said action and did settle the same by paying to Ruth Buffington and Robert Buffington, her husband, the sum of \$15,000.00 in full settlement therefor.

Plaintiff's Contentions As To Plaintiff's First Cause of Action

I.

Plaintiff contends that the payment of the sum of \$15,000.00 to Ruth Buffington and Robert Buffington, her husband, in full settlement of the Buffington case was a fair and reasonable sum to be paid in the settlement thereof.

II.

Plaintiff contends that the action as brought by Ruth Buffington, known as the Buffington Case,

is subject to an action to which Plaintiff was afforded protection under the insuring agreements of the policy of insurance, No. 880-7277 issued by Defendant and that Defendant breached this contract of insurance with Plaintiff when it refused to accept coverage thereunder to Plaintiff's damage in the sum of \$15,000.00.

III.

Plaintiff contends that in addition to damages of \$15,000.00, it is entitled to a reasonable attorneys fee herein. That more than six months have elapsed since the tender of the Buffington Case to the Defendant, and that a reasonable attorneys fee would be the sum of \$3500.00.

Plaintiff's Contentions As To Plaintiff's Second Cause of Action

I.

Plaintiff contends that the Comprehensive Public Liability policy issued by Defendant, as hereinabove described, provides that Defendant shall defend any suit brought against the Plaintiff covered by the insuring agreements of said policy, and that Defendant in refusing to defend Plaintiff, after Plaintiff tendered to Defendant the defense of the Buffington Case, did procure counsel to defend said action and did incur and pay an attorneys fee of \$750.00, which was a reasonable fee therefor and did incur and pay costs amounting to \$260.73, all of which was necessarily incurred in the

defense of said action, to Plaintiff's further damage in the sum of \$1,010.73.

II.

Plaintiff contends that in addition to being damaged in the sum of \$1,010.73, Plaintiff is entitled to a reasonable attorneys fee herein. That more than six months have elapsed since the date of the tender of the said above mentioned Buffington Case to Defendant, and that a reasonable attorneys fee to be allowed in this second cause of action would be the sum of \$700.00.

Defendant's Contentions As To Plaintiff's

First and Second Causes of Action

The Defendant denies the foregoing contentions of the Plaintiff and further contends:

I.

The "Exclusion of Product Liability" rider attached to the liability policy No. 880-7277 excluded any coverage to the named insured for injury or destruction involved in or arising out of the accident occurring on or about December 3rd, 1953.

II.

The Defendant contends that it is not liable for attorneys fees incurred or alleged to have been incurred by the Plaintiff.

III.

The Defendant contends that it was under no obligation to defend any action brought against the

Plaintiff arising out of the accident of December 3rd, 1953.

IV.

That the Plaintiff is bound by the "Exclusion of Product Liability" rider attached to and made a part of Policy No. 880-7277 which reads as follows:

"Exclusion of Product Liability

Exclusions (A) and (B) below are applicable only when checked.

X (A) Bodily Injury

It is agreed that the policy does not apply to bodily injury, sickness or disease, including death at any time resulting therefrom.

X (B) Property Damage

injury to or destruction of property (including loss of use of such property): if caused by the handling or use of, or the existence of any condition in goods or products manufactured, sold, handled or distributed by the Insured when the occurrence takes place away from the premises owned, rented or controlled by the Insured, and after the Insured has relinquished possession of such goods or products to others or if caused by operations if the accident occurs after such operations have been completed or abandoned at the place of occurrence (other than pick up and delivery, and the existence of tools, uninstalled equipment, and abandoned or unused material); provided, operations shall not be deemed incomplete because improperly or defectively performed

or because further operations may be required pursuant to a service or maintenance agreement.

Subject, otherwise, to all the terms and conditions of the policy.

Attached to and hereby made a part of policy No. of the Northwest Casualty Company, of Seattle, Washington.”

V.

That the settlement of \$15,000.00, made by Plaintiff in the Buffington case, was done without the knowledge, consent or liability on the part of the Defendant and was purely a volunteer payment for which the Defendant is not liable.

VI.

That the Defendant was under no responsibility or liability for any claim, claims, expenditures or attorneys fees incurred or presented to the Plaintiff as a result of the accident of December 3, 1953.

Plaintiff denies Defendant's contentions.

Issues To Be Determined

I.

Did the policy of insurance entitled, “Comprehensive Public Liability policy No. 880-7277, issued by Defendant on or about the 9th day of January, 1953, together with the Exclusion of Product Liability endorsement attached thereto afford cover-

age thereunder to Plaintiff as against the liability as set forth in the Buffington case?

II.

Was the sum of \$15,000.00 paid by Plaintiff in settlement of the Buffington case a reasonable sum therefor?

III.

Was the sum of \$750.00, attorneys fees, and \$260.73, costs incurred by Plaintiff in the defense and settlement of the Buffington case, and if so, was it reasonable expense incurred in the defense and settlement thereof?

IV.

Have more than six months elapsed since the tender of the Buffington case by Plaintiff to Defendant, and if so, is the sum of \$3500.00 a reasonable attorneys fee to be allowed in Plaintiff's first cause of action herein, and the sum of \$700.00 a reasonable attorneys fee herein to be allowed Plaintiff in Plaintiff's second cause of action?

V.

Is the Defendant liable for the payment of any attorneys fee, and if so, in what amount?

Physical Exhibits

Certain physical exhibits have been received as pre-trial exhibits. The parties agreeing, with the approval of the Court, that no further identifica-

tion of the exhibits is necessary, and that photostatic copies may be marked and used in lieu of the originals. In the event that said exhibits, or any part thereof, shall be offered in evidence at the time of trial, said exhibits are to be subject to objections only on the ground of relevancy, competency and materiality.

Plaintiff's Exhibits

1. Release dated June 28, 1956, by and between Ruth Buffington and Robert Buffington, her husband and Tidewater Associated Oil Company, a corporation, Frank Moore, Jr. and Wm. V. Sherer.

2. Stipulation of dismissal in the case entitled, "Ruth Buffington, Plaintiff, vs. Wm. V. Sherer, Frank Moore, Jr. and Tidewater Associated Oil Company, a corporation, Defendants", being case No. 19175 in the Circuit Court of the State of Oregon in and for the County of Coos entered into in June, 1956, by and between D. J. Grant of attorneys for Plaintiff, and Andrew W. Newhouse, of attorneys for Defendant.

3. Photostatic copy of policy, Comprehensive Public Liability, No. 880-7277 of the Northwest Casualty Company issued December 24, 1952, together with riders attached thereto naming as insured Wm. V. Sherer and as additional insured, Tidewater Associated Oil Company.

4. Letter of Northwest Mutual Insurance Company of Seattle, Washington, dated January 27, 1956, addressed to Tidewater Associated Oil Company re policy No. 880-7277.

5. Loan agreement by and between Continental Casualty Company, a corporation and Tidewater Oil Company, a corporation.

6. Letter dated April 23, 1956, from Andrew J. Newhouse to Continental Casualty Company re Buffington case.

7. Letter dated June 29, 1956, from A. J. Newhouse to Continental Casualty Company re Buffington case.

8. Statement dated July 25, 1956, from McKeown, Newhouse & Johnson to Continental Casualty Company re cost in Buffington case.

9. Photostatic copy of complaint and summons in case entitled, "Ruth Buffington, Plaintiff, vs. Wm. V. Sherer, Frank Moore, Jr. and Tidewater Associated Oil Company, a corporation, Defendants, being case No. 19175 in the Circuit Court of the State of Oregon in and for the County of Coos.

10. Endorsement for insurance policy entitled, "Erroneous Delivery of Fluids or Semi-Fluids".

Defendant's Exhibits

1. Statement of William V. Sherer dated May 27, 1954.

2. Statements of Frank L. Moore, Jr. dated May 28, 1954 and June 2, 1954.

3. Letter from Northwest Casualty Company to William V. Sherer, dated June 9, 1954.

4. Statement of Jay Hess dated June 3, 1954.

5. Letter from James G. Frame to Frank Moore, Jr. dated June 10, 1954.

Jury Trial

No request has been made by Plaintiff or Defendant for trial by jury.

The parties hereto agree to the foregoing Pre-Trial Order and the Court being fully advised in the premises:

Now Orders that the foregoing Pre-Trial Order shall not be amended except by consent by both parties, or to prevent manifest injustice; and

It Is Further Ordered that the Pre-Trial Order supercedes all pleadings; and

It Is Further Ordered that upon trial of this cause no proof shall be required as to matters of fact hereinabove specifically found to be admitted, but that proof upon the issues of fact and law between Plaintiff and Defendant as hereinabove stated shall be had.

Dated at Portland, Oregon, this 22nd day of January, 1958.

/s/ GUS J. SOLOMON,
Judge.

Approved:

/s/ C. E. WHELOCK,
Of Attorneys for Plaintiff.

/s/ WM. C. RALSTON,
Of Attorneys for Defendant.

[Endorsed]: Filed January 22, 1958.

[Title of District Court and Cause.]

OPINION

Solomon, Judge:

I am of the opinion that the sum of \$15,000.00 paid in settlement of the case brought by Ruth Buffington against Wm. V. Sherer, Frank Moore, Jr., and Tidewater Associated Oil Company was a reasonable sum and that the attorney fees charged and the expenses incurred in the defense of that action were likewise reasonable.

However, I am of the opinion that the "Exclusion of Product Liability" rider attached to the policy issued by Northwest Casualty Company to Wm. V. Sherer deprived him, as well as the other defendants named in the action brought by Ruth Buffington, of any coverage for the accident and injuries therein described.

I further find that Northwest Casualty Company was not obligated to defend the action, to settle it, or to pay any judgment that may have been rendered had the action not been settled.

Attorneys for the defendant shall prepare findings of fact, conclusions of law, and a judgment in accordance with this opinion.

[Endorsed]: Filed April 17. 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

I.

That the plaintiff is a citizen of the state of Delaware, and the defendant is a citizen of the state of Washington. That the amount in controversy, exclusive of interest and costs exceeds the amount of \$3,000.00.

II.

That the plaintiff was licensed to and was carrying on a gasoline and oil distributing business within the state of Oregon and had entered into a "Distribution Consignment" contract with one William V. Sherer, of Bandon, Coos County, Oregon. That said contract was in full force and effect at all times herein mentioned.

III.

That the defendant was duly qualified to carry on a general insurance business in the State of Oregon and elsewhere.

IV.

That on or about the 9th day of January, 1953, the defendant executed and delivered to William V. Sherer, a "Comprehensive Public Liability" policy of insurance being No. 880-7277 with the plaintiff as an additional named insured. That said policy was in full force and effect on the 3rd day of December, 1953.

V.

That on the 1st day of December, 1953, one Ruth Buffington placed an order for stove oil with the said William V. Sherer and the plaintiff, and that a delivery was made.

VI.

That on the 3rd day of December, 1953, Ruth Buffington attempted to start a wood fire with the product delivered and that the same exploded, severely burning the said Ruth Buffington and also causing property damage.

VII.

That on September 12, 1955, Ruth Buffington served upon the plaintiff and others, a summons and complaint for the recovery of damages caused by the explosion hereinabove referred to, claiming negligence and violation of warranty.

VIII.

That the plaintiff, on January 25, 1956, tendered the defense of the said action brought by Ruth Buffington to the defendant. The defendant denied coverage under its policy and refused to defend.

IX.

That the defendant's policy of insurance hereinabove referred to, in part reads:

“Exclusion of Product Liability

Exclusions (A) and (B) below are applicable only when checked.

X (A) Bodily Injury

It is agreed that the policy does not apply to bodily injury, sickness or disease, including death at any time resulting therefrom.

X (B) Property Damage

It is agreed that the policy does not apply to injury to or destruction of property (including loss of use of such property), if caused by the handling or use of, or the existence of any condition in goods or products manufactured, sold, handled or distributed by the Insured when the occurrence takes place away from the premises owned, rented or controlled by the Insured, and after the Insured has relinquished possession of such goods or products to others or if caused by operations if the accident occurs after such operations have been completed or abandoned at the place of occurrence (other than pick up and delivery, and the existence of tools, uninstalled equipment, and abandoned or unused material); provided, operations shall not be deemed incomplete because improperly or defectively performed or because further operations may be required pursuant to a service or maintenance agreement.

Subject, otherwise, to all the terms and conditions of the policy.

Attached to and hereby made a part of policy No. of the Northwest Casualty Company, of Seattle, Washington."

X.

The plaintiff was also insured by a policy of in-

surance executed and delivered by the Continental Casualty Company, who, through some loan agreement with the plaintiff, did employ counsel and settle said action brought against the plaintiff and others; the property damage claim and the claim of the defendant's husband for the sum of \$15,000.00 and obtained releases. That attorney's fees and costs expended was the sum of \$1010.73.

Conclusions of Law

Based upon the foregoing Findings of Fact, the Court concludes:

I.

That this court has jurisdiction over this cause and the respective parties.

II.

That under the "Comprehensive Public Liability" policy executed by the defendant, there was no obligation requiring the defendant to accept the defense for this plaintiff or any of the defendants in the case of Ruth Buffington vs. Tidewater Associated Oil Company, et al, nor to make any settlement or pay any judgment that might have been recovered in said action.

III.

That the settlement made and the attorney's fees and costs paid in the defense of the Plaintiff were reasonable charges and amounts.

IV.

That the defendant is entitled to judgment in its favor.

Made and entered this 29th day of April, 1958.

/s/ GUS J. SOLOMON,
District Judge.

[Endorsed]: Filed April 29, 1958.

In The United States District Court
For The District of Oregon

Civil No. 9168

TIDEWATER ASSOCIATED OIL COMPANY,
a Delaware corporation, Plaintiff,

vs.

NORTHWEST CASUALTY COMPANY, a Wash-
ington corporation, Defendant.

JUDGMENT

Based on the Findings of Fact and Conclusions of Law heretofore made and entered herein,

It Is Considered, Ordered and Adjudged that the complaint of the plaintiff be, and it is hereby dismissed, and that the defendant have and recover judgment against the plaintiff for costs and disbursements herein incurred, taxed at \$20.00 and let execution issue therefor.

Dated this 29th day of April, 1958.

/s/ GUS J. SOLOMON,
District Judge.

[Endorsed]: Filed April 29, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Tidewater Associated Oil Company, a Delaware corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on the 29th day of April, 1958.

WHEELLOCK, RICHARDSON &
NIEHAUS,
/s/ C. R. RICHARDSON,
Attorneys for Appellant, Tidewater
Associated Oil Company.

[Endorsed]: Filed May 27, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant will contend that the action as brought by Ruth Buffington, and known in this action as

the Buffington Case, is such an action to which plaintiff-appellant was afforded protection under the insuring agreements of the policy of insurance, being plaintiff's Exhibit Number 3, and that defendant-appellee breached said contract of insurance with plaintiff-appellant when it refused to defend said action known as the Buffington Case and to accept coverage thereunder, to plaintiff-appellant's damage as set forth in its Complaint.

Dated at Portland, Oregon, this 6th day of June, 1958.

WHEELOCK, RICHARDSON &
NIEHAUS,

/s/ By C. R. RICHARDSON,
Of Attorneys for Plaintiff-
Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed June 6, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint, Answer, Pre-trial Order, Opinion of Judge Solomon, Findings of Fact, Conclusions of Law, Judgment, Notice of Appeal, Undertaking for Cost

on Appeal, Designation of record on appeal with excerpt from Reporter's Transcript, attached, Order to forward exhibits, Defendant's Designation of record on appeal, and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 9168, in which Tidewater Associated Oil Company, a Delaware corporation is the plaintiff and appellant, and Northwest Casualty Company, a Washington corporation, is the defendant and appellee; that said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that there are enclosed herewith exhibits numbered 1 to 5, 9 & 10, inclusive.

I further certify that the cost of filing the notice of appeal \$5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 24th day of June, 1958.

[Seal]

R. DeMOTT,

Clerk,

/s/ By MILDRED SPARGO,

Deputy.

[Endorsed]: No. 16072. United States Court of Appeals for the Ninth Circuit. Tidewater Associated Oil Company, a corporation, Appellant, vs. Northwest Casualty Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: June 25, 1958.

Docketed: July 3, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 16072

TIDEWATER ASSOCIATED OIL COMPANY,
a Delaware Corporation, Appellant,

vs.

NORTHWEST CASUALTY COMPANY, a Wash-
ington Corporation, Appellee.

APPELLANT'S DESIGNATION OF THE REC-
ORD TO BE PRINTED WITH STIPULA-
TION OF COUNSEL FOR APPELLANT
AND APPELLEE

Appellant hereby designates the matters referred
to herein as the record to be printed and neces-

sary for consideration as follows:

- (1) Complaint (together with Exhibits attached).
- (2) Answer.
- (3) Pre-Trial Order.
- (4) Opinion of the Court.
- (5) Findings of Fact and Conclusions of Law.
- (6) Judgment.
- (7) Statement of Points upon which Appellant intends to rely on appeal, as set forth in Appellant's Designation of Contents of Record on Appeal.
- (8) This Designation of Parts of the Record.

/s/ C. R. RICHARDSON,
Of Attorneys for Appellant.

Stipulation

It Is Hereby Stipulated by and between counsel for appellant and counsel for appellee that the exhibits as set forth in Appellant's Designation of Contents of Record on Appeal and Appellee's Designation of Contents of Record on Appeal may be read in their original form; and

It Is Further Stipulated that at the time of the trial of the above-entitled cause in the United States District Court for the District of Oregon, that counsel for the respective parties stipulated that more than six months had elapsed since the tender of the cause of action known as the "Buffington Case" by plaintiff therein to defendant therein, being appellant and appellee herein respectively,

and that the Court, in the event of a judgment in favor of plaintiff, could set the attorneys' fees for plaintiff, the appellant herein, as to both causes of action in plaintiff-appellant's Complaint, in such sum as the court determined just and reasonable.

Dated at Portland, Oregon, this 2nd day of July, 1958.

/s/ C. R. RICHARDSON,
Of Attorneys for Appellant.

/s/ LEO LEVENSON,
Of Attorneys for Appellee.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 3, 1958. Paul P. O'Brien,
Clerk.

NO. 16072

United States
COURT OF APPEALS
for the Ninth Circuit

TIDEWATER ASSOCIATED OIL COMPANY,
a Corporation,

Appellant,

vs.

NORTHWEST CASUALTY COMPANY,
a Corporation,

Appellee.

APPELLANT'S BRIEF

*Appeal from the United States District Court
for the District of Oregon.*

PHILLIPS & SANDEBERG,
WM. C. RALSTON,
W. K. PHILLIPS,
Public Service Building,
Portland 4, Oregon,

WHEELOCK, RICHARDSON & NIEHAUS,
C. R. RICHARDSON,
Corbett Building,
Portland 4, Oregon,
For Appellant.

LEO LEVENSON,
314 Portland Trust Building
Portland 4, Oregon
For Appellee.

FILED

OCT 6 1958

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United States
COURT OF APPEALS
for the Ninth Circuit

TIDEWATER ASSOCIATED OIL COMPANY,
a Corporation,

Appellant,

vs.

NORTHWEST CASUALTY COMPANY,
a Corporation,

Appellee.

APPELLANT'S BRIEF

*Appeal from the United States District Court
for the District of Oregon.*

**STATEMENT OF PLEADINGS
AND JURISDICTION**

The Complaint was filed on May 2, 1957, in the Circuit Court of the State of Oregon for the County of Multnomah (R., pp 3, 6). A petition for removal was filed in the United States District Court for the District of Oregon on May 17, 1957, on the basis that said controversy was between citizens of different states and exceeded the sum of \$3,000.00, thus giving said court jurisdiction (Title 28, U. S. C. A., †1332,

and Title 28, U. S. C. A., †1441). On May 17, 1957, an answer was tendered and filed by appellee (R., pp 21, 25). The judgement was filed on April 29, 1958 (R., pp 41, 42). Thereafter, a notice of appeal was filed by appellant on May 27, 1958 (R., p 42), and this court has jurisdiction to hear said appeal under 28 U. S. C. A. 1291.

STATEMENT OF THE CASE

Appellee, on the 24th day of December, 1952, issued and delivered to one, Wm. V. Sherer, its certain Comprehensive Public Liability Policy, No. 880-7277 (See appellant's Trial Exhibit No. 3). Sherer was employed as a gasoline and oil distributor by appellant at Bandon, Coos County, Oregon. Said policy provided coverage for bodily injury not to exceed \$25,000.00 for each person and \$50,000.00 for each occurrence, and appellant by endorsement upon said policy was a named insured so far as its interest was concerned in the operation of Wm. V. Sherer. Attached to the policy was an endorsement entitled, "Exclusion of Product Liability."

On December 1, 1953, Ruth Buffington, who resided near Bandon, Oregon, ordered stove oil through appellant's distributor, Wm. V. Sherer, to be put in a stove oil storage tank, which was attached to the outside of said residence (R., pp 7, 18). Pursuant to the order, a truck drove to the residence on December 2, 1953, and before any stove oil had been placed in the storage tank, Ruth Buffington requested the driver to fill a small can which she kept on the back porch, and stove oil from which she used in order to facilitate the starting of fires in the kitchen stove. The truck was divided into compartments, one of which contained

stove oil, one of which contained regular gasoline, and one of which contained ethyl gasoline. One hose served all three compartments. The driver took this hose and filled the small can. Immediately prior to this, the driver had used the hose to deliver gasoline (R., p 12). Ruth Buffington took the small can on the morning of December 3, 1953, and in using the contents of the same to facilitate starting her kitchen stove fire was seriously and severely burned when the can exploded and enveloped her in flames. (R., pp 13, 14).

On September 12, 1955, appellant was served with Summons and Complaint in an action brought by Ruth Buffington (R., p 7, 18). The policy mentioned above, being in full force and effect on this date, appellant tendered the defense of the above action to appellee, who by letter denied liability under the policy and refused to defend the same on behalf of appellant or any of the other defendants named, including Wm. V. Sherer (R., pp 19, 20). The appellant, through its excess coverage insurer, Continental Casualty Company, thereupon undertook to defend the action and prior to trial compromised and settled the same for the sum of \$15,000.00, and in doing so further expended \$750.00 attorneys fees, and \$260.73 in costs (R., pp 39, 40).

Appellant then brought an action against appellee for refusal to accept liability and for refusal to defend (R., pp 3, 6). At the trial it was stipulated that more than six months had elapsed since the tender of the defense as mentioned above, and the court, in the event of a decision favoring appellant, could set reasonable attorneys fees on

the two causes of action in appellant's Complaint. It was the opinion of the court that although the \$15,000.00 paid in settlement of the Buffington action was reasonable as were the expenditures for costs and attorneys fees, there was no coverage afforded appellant under the policy and no obligation of the appellee to defend appellant in said action. The opinion was based upon the rider attached to the policy entitled, "Exclusion of Product Liability" (R., pp 38, 39).

STATEMENT OF POINTS TO BE URGED

The court below erred in that the action brought by Ruth Buffington against appellant was such an action to which appellant was afforded protection under the insuring agreements of the policy of insurance (Appellant's Trial Exhibit No. 3), and appellee breached said insurance contract by:

(1) Failing to accept coverage in view of the negligence alleged in the Buffington Complaint,

AND

(2) Failing to defend appellant in said action in accordance with the terms of said policy.

SUMMARY OF ARGUMENT

The District Court's conclusion that the Ruth Buffington Complaint did not describe an accident and injuries bringing it within the coverage of the policy issued by appellee because of the rider attached and entitled, "Exclusion of Product Liability," and that appellee had no duty to defend appellant and the other insureds, is against the great weight of authority.

The controlling factors in determining whether or not there is coverage afforded appellant under the Comprehensive Public Liability Policy issued by appellee are the matters contained within the allegations of the Ruth Buffington Complaint. If any one of the allegations bring the action within the coverage of the policy or could reasonably be construed to be covered therein then it was the duty of the appellee to defend appellant.

In the event such defense is refused when tendered, the general and prevailing rule is that the insurer is liable not only for the costs of defense and attorneys fees incurred by insured, but the insured may make reasonable settlement or compromise of the action and obtain reimbursement from the insurer.

The negligence alleged in three of the four allegations contained within the first cause of action of the Buffington Complaint (R., pp 11, 13) is directed to the negligent use of the hose upon the truck by the driver, as well as the use of faulty equipment of the appellant. Certainly these allegations of negligence are not directed to a product of the appellant or a defect in a product of the appellant such as might be covered in "Exclusion of Product Liability" endorsement.

It is the apparent and clear intention of Ruth Buffington to claim that appellant's fuel truck with three compartments served with but one hose was faulty equipment when used to dispense both explosive and non-explosive fuel, and it was this negligence which proximately contributed to the accident and injuries suffered by Ruth Buffington. This liability is covered under the general insuring agreements of the policy.

ARGUMENT

Where the provision of a liability policy requires the insurer to defend an action brought against the insured and the insurer refuses to defend in the name of the insured, the insured may proceed to defend the action and hold the insurer liable for such sums as were expended in good faith in compromise and settlement of the action, as well as reasonable costs and attorneys fees involved. The appellee, in view of the negligence alledged in the Buffington Complaint (R., pp 11, 13), had a duty to defend the appellant, and breached its said contract of insurance in failing to do so.

The general rule is that when the requirement to defend is a policy provision, then the duty is determined by the allegations of the complaint filed against the insured.

50 ALR 2d, p 465.

8 Appleman, Insurance Law & Practice, paragraphs 4684-5.

Where a complaint filed against an insured clearly alleges damages resulting from an alleged negligent operation of the insured and a policy of insurance provides that the insurer shall defend all suits even if groundless, it has been held that the language of the contract must first be looked to, and next the allegations of the complaint in the action against the insured, and the refusal to defend by the insurer is a breach of the contract, and the insured by such action is released from any obligation to leave the management of the suit to the insurer and is justified in proceeding to defend on his own account.

Lamb vs. Belt Casualty Co., 3 Cal. APP (2d) 624, 40 P (2d) 311.

Where the allegation of facts within a complaint are partly within and partly outside of the policy coverage, the insured has a duty to defend, and even though there be a conflict as between the allegations of the complaint and the known facts, the better view is that the courts will adhere to the rule that the allegations of the complaint are controlling.

50 ALR 2d, pp 496 and 506.

Remmer v. Glen Falls Indem. Co. (1956) (Cal. APP 2d), 295, P2d 19.

It is further stated in 50 ALR 2d at page 506, paragraph 24, as follows:

“Where a complaint alleges facts which represent a risk outside the coverage of the policy but also avers facts, which, if proved, represent a covered risk, the insurer is under a duty to defend. Stated differently the fact that grounds of damage against the insured other than those stated in the policy, and liability against others than the insured, were pleaded, is immaterial if the injured person pleaded any grounds against the insured coming within the terms of the policy.” (Citing many authorities)

The court stated in the case of Boutwell vs. Employers Liability Assur. Corp. (1949) (CA 5th Miss.) 175 F2d, 597, in speaking of the duty of the insurer under an agreement to defend:

“Its obligation was not merely to defend in cases having perfect declarations, but in cases where by any reasonable intendment of the pleadings liability could be inferred.”

Even though the action filed against insured eventually proved groundless and was defeated, it has been held that

the insurer was required to defend an action in which the cause was based on a claim for damages covered by the policy, wherein insurer agreed or undertook to defend such suit whether groundless or not, and the insurer held liable for the costs and expenses of the insured in making his own defense to said action.

Bloom-Rosenblum-Kline Co. v. Union Indem. Co.,
121 Ohio ST 220, 167 N. E. 884.

Journal Publishing Co. v. General Casualty Co.,
210 F2d 202.

8 Appleman, Insurance Law & Practice, paragraph
4691.

If an insurer unjustifiably refuses to defend a suit, the insured may make a reasonable settlement or compromise of the injured person's claim, and is then entitled to reimbursement from the insurer.

8 Appleman, Insurance Law & Practice, paragraph
4690.

It would therefore appear to be the general and prevailing rule that an insurer has the duty to defend where any one of the allegations of a complaint brought against an insured are within the general insuring agreements of the policy. In the case at hand, appellant, upon the appellee's refusal to defend, proceeded to defend and settle and compromise the Buffington claim by the payment of \$15,000.00, which the lower court determined to be a fair and reasonable sum in the settlement thereof, and in such defense expended the sum of \$260.73 actual costs, and \$750.00 attorneys fees, which the lower court also determined to be fair and reasonable sums, so that the reasonableness of the

settlement and the costs and attorneys fees is not at issue in this appeal, nor is there at issue in this appeal the right of appellant to recover attorneys fees upon the complaint brought against appellee in the event of a favorable decision to appellant, in that in the lower court it was stipulated that the court could set such fees in such event (R., pp 46, 47).

Under Oregon law, an insured has the right to recover reasonable attorneys fees from an insurer who has refused to defend an action brought against the insured where more than six months has expired from the date of the tender and no settlement is made by insurer.

Journal Publishing Co. v. General Casualty Co.,
210 F2d 202. (supra).

Oregon Revised Statutes, Section 736.325.

The allegations of the complaint brought against an insured under a Public Liability Policy are the controlling factors in determining whether or not there is coverage for the insured under the policy.

The averments of negligence set forth in the first cause of action of the Buffington Complaint were such allegations as brought the action within the general insuring agreements of the Comprehensive Public Liability Policy written by appellee and upon which appellant appeared as a named insured.

The general insuring agreements of the policy of insurance in question read as follows (See Page 2, Appellants' Trial Exhibit No. 3):

"INSURING AGREEMENTS

1. To pay on behalf of the Insured, all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law, or assumed by him under any warranty of goods or products, or any written contract:

(a) for damages, including damages for care and loss of services, because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained or alleged to have been sustained by any person or persons;"

The allegations of negligence set forth in the first cause of action of the Buffington Complaint are as follows: (R., pp 11, 13)

"IX.

That Plaintiff's injuries heretofore mentioned and as hereinafter set forth were proximately caused by the carelessness and negligence of the Defendants, in the following particulars, to-wit:

(a) In furnishing to Plaintiff a petroleum product other than stove oil, or in furnishing another petroleum product mixed with stove oil, either of which when used for the purpose for which the Defendants knew it was going to be used, was highly explosive and would ignite with great fury and violence, was extremely dangerous and under no circumstances adaptable for the use for which Plaintiff desired said petroleum product, all of which was known to the Defendants, or with reasonable care and caution should have been known to the Defendants.

(b) That Defendants pumped from the only hose located on the truck used in the delivery of said petroleum product and into plaintiff's can a petroleum product which Defendants represented to be stove oil, when Defendants had immediately prior thereto pumped through the same hose gasoline, and when said Defendants knew, or in the exercise of reasonable care should have known, that said hose still contained

gasoline and that said gasoline would be the first petroleum product to go into said can from said hose, and when used for the purpose for which Plaintiff intended to use the same, whether entirely gasoline or a mixture of gasoline and stove oil would constitute a highly explosive and dangerous material not suited or intended for the use contemplated by Plaintiff, and likely to cause serious injury to Plaintiff.

(c) In failing to pump a sufficient quantity of petroleum product into the stove oil storage tank, thereby removing all trace of gasoline from said hose, and thereby eliminating the possibility that said hose contained any gasoline prior to placing any stove oil in the can for Plaintiff.

(d) In failing to have and maintain upon said truck a separate hose to be used exclusively for stove oil, and thereby preventing a highly combustible, explosive, inflammable and dangerous product such as gasoline, or a highly combustible, explosive, inflammable and dangerous product such as a mixture of gasoline and stove oil, being delivered to a person for the purpose of facilitating the starting of kitchen stove fires, and particularly, to this plaintiff when the same was represented to her to be entirely stove oil."

Appellant makes no point as to allegation (a), but as to the remaining allegations of the Buffington Complaint stated above, appellant alleges that they are within the general insuring agreements of the policy of insurance in question, in that the acts of negligence are directed to the use of faulty equipment and/or the negligence of the truck driver and not a product of the insured or a defect in a product manufactured by the insured. In paragraph (b) and (c) the claimant alleges that the negligence was the pumping of fuel oil products from a tank truck through a single hose serving both explosive and non-explosive products and failing to properly rid the hose of a highly

explosive product before delivering a non-explosive product. Allegation (d) is directed to the negligence of the appellant in using and operating a fuel oil truck without a separate hose upon it to deliver stove oil, a non-explosive product, but using the same hose for both non-explosive and highly explosive fuels. It would seem to clearly indicate an intention on the part of the pleader that the use of the faulty equipment and/or the negligence of the truck driver was the negligence proximately contributing to the accident alleged in the Buffington Complaint. The following are cases supporting this contention:

Employers Liability Assurance Corp., Ltd., vs. Youghioghney & Ohio Coal Co., (United States Court of Appeals, Eighth Circuit, July 7, 1954) 214 F2d, 418.

This case involved an action by an insured coal company against its liability insurer, which had refused to defend a personal injury action brought against the insured, to recover damages alleged to be within coverage of the policy. In this case, the coal company at its premises in Superior, Wisconsin, accepted, prepared for loading, and loaded with coal a certain freight car. The car was thereafter delivered to the Great Northern Railway Company, "spotted" on a siding at Princeton, Minnesota, and an employee of the consignee of the car, one Burnett, in attempting to open one of the sliding doors of the car was severely injured when the door left its moorings and crashed down upon him. The injured party brought an action against the coal company and railroad companies involved. That among the acts of negligence alleged were the following:

"That said coal company knew, or in the exercise of reasonable or ordinary care should have known,

that said railroad freight car was in bad order and unfit for the transportation of coal. ***

“That said coal company knew, or in the exercise of reasonable or ordinary care should have known that in the type of car furnished it by its co-defendants there is required to be erected and securely fastened a false door, so as to prevent the bulk coal from pressing against the outside sliding doors of said car.

“That said defendant coal company carelessly and negligently failed and neglected, either to install the false door or sheeting between the outside door and the bulk coal proper, or carelessly and negligently failed and neglected to properly secure said false door or sheeting so that said bulk coal would not bear its weight, in whole or in part, directly against the outside of (the) sliding door of said car.”

The policy contained the usual insuring agreements of a liability policy covering the coal company's premises and operations at Superior, Wisconsin, including an agreement to defend. That among the exclusions in said policy was one defining products, which is almost identical to the one in the case at hand. The insurance carrier refused to defend after a tender of the defense, claiming that the injuries were not covered by the policy and were excluded by reason of the products clause, as well as another clause having to do with “vehicles * * * or the loading or unloading thereof, * * *.” The coal company accordingly undertook its own defense, and during the course of the trial “upon advise of counsel” settled the case.

The trial court filed an opinion, and its conclusion was expressed in portions as follows:

“The question of coverage is to be determined from the allegations in the complaint against the insured.

“With respect to defendant’s contention that the products liability coverage which plaintiff could have, but had not, purchased would have granted it protection, the short answer is that if the injury to Burnett resulted from a defective freight car or in negligence in failing to discover and remedy such defect or even in the faulty preparation of the car prior to loading, as alleged by Burnett no defective condition in the products handled by the plaintiff was involved. Certainly, the freight car was not a product of the insured.”

The appellant court upheld the decision of the lower court and stated as follows:

“ . . . it was not the negligent handling of the product coal, in the loading of the car in Wisconsin in this case, but the negligence of the defendant in loading and shipping the coal in a defective car.

“As pointed out by the trial court, ‘the allegations of Burnett’s complaint with respect to the liability of this plaintiff (coal company) had nothing to do with the products of the insured . . .’ We cannot say that the court erred in so holding.”

Philadelphia Fire and Marine Insurance Company, et al, vs. Grandview 42 Wash. 2d 357, 255 P2d, 540.

The above case involved the same insurance company as the appellee herein, and furthermore the policy was for all purposes identical even to having attached thereto an “Exclusion of Product Liability” clause identical to the one attached to the policy in the case before this court. An action was brought against the City of Grandview by one Hunt, whose home was damaged when an explosion occurred in the residence next door owned by one Russell. The basis of a judgment received by Hunt against the City of Grandview was that the water department of the

City of Grandview, by and through its superintendent, negligently and carelessly permitted a highly inflammable and explosive methane gas to be introduced, pumped into and carried through the pipes of its water system to dwellings within the City of Grandview, including the dwelling of Russell, and in negligently and carelessly directing the Russells to open their faucets and permit the gas to enter into and fill their residence when they knew, or should have known, that it would ignite, explode and cause damage. The Supreme Court affirmed the holding of the trial court and stated that the proximate cause of the accident was the negligence of the employees of the city and that the product liability exclusion endorsement did not cover the situation presented and that the negligence was within the general insuring agreements of the policy.

A. R. Heyward, II, and C. D. Tucker, doing business as W. B. Guimarin & Company, plaintiffs, vs. American Casualty Company of Reading, Pennsylvania, defendant (United States District Court E. D. So. Carolina, Columbia Division, March 2, 1955) 129 F. Supp 4.

This was an action brought for a declaratory judgment that liability insurer had an obligation to defend an action in the State Court against insured and pay any judgment rendered. The court held that the allegations of the complaint and answer in the State Court action raised substantial fact issues requiring the insurer to defend. The facts of the case were that the insured had a sub-contract on a large housing project for the plumbing and heating portion of the project, which involved, among other things, the construction of underground gas lines. That as the units were completed, they were apparently occupied, and

prior to the completion of the entire project an explosion occurred in one of the apartments causing personal injuries to a person who thereafter proceeded against the insured in the State Court, as well as other contractors upon the job, the housing authority and the sureties on performance bonds given by the various contractors.

The policy involved was a comprehensive liability policy covering both personal injury and property damage, and the insuring agreements were similar to the policy involved in the present case. The policy further contained an agreement to defend suits brought against the named insured, even if they were groundless, false or fraudulent, and also by an endorsement declared that the policy did not apply to product liability, which was defined under the term "Definitions" to mean as set forth therein, which terminology is for purposes of argument here, almost identical.

The court, after considerable discussion as to the meaning of words and phrases and language used generally in insurance policies and the difficulty of interpretation thereof, stated as follows:

"Products liability, to the average person, refers to liability arising out of the use of, or existence of any condition in goods or products manufactured, sold, handled or distributed by the insured. The suit in the State Court involved no such liability, but is based on alleged negligent construction by the plaintiff.

"(8) After a careful analysis of all the relevant provisions of the policy, I must conclude that a plumbing and heating contractors comprehensive liability coverage is not covered under the heading 'Products,' and that the policy here involved should be construed to cover the liability for accidents arising from plain-

tiff's operations whether the accident happened before or after the housing project was completed.

"A careful analysis of the complaint in the State Court will show that it does not clearly and definitely allege that plaintiff's 'Operations' had been completed. The allegations of the complaint indicate a clear intention on the part of the pleader to claim that the gas installations leading into Apartment 14-E were negligently constructed. It did not matter to the plaintiff whether he was injured before or after the plaintiff's 'Operations' had been completed. It is clearly apparent from the allegations of the complaint in the State Court action that the plaintiff could have recovered by showing that the explosion occurred before plaintiff's 'Operations' on this project had been completed. This being true the Insurance Company owed a duty to the plaintiff to defend the action. *Employers Mutual Liability Ins. Co. of Wisconsin vs. Hendrix*, 4 Cir., 199 F. 2d 53; *Lee v. Aetna Casualty & Surety Co.*, supra, 178 F. 2d 750; *Boutwell v. Employers Liability Assurance Corp.*, 5 Cir., 175 F. 2d 597. To paraphrase Judge Soper's language in the *Hendrix* case, supra: In other words, it was obvious to the insurer upon reading the complaint that it was not essential to recovery that the claimant show that plaintiff's 'Operations' had been completed, because claimant could recover damages from defendants by merely showing that they were negligent in the construction of the project.

"In *Boutwell v. Employer's Liability Assurance Corp.*, supra, 175 F. 2d 597, 599, the facts were quite similar to those here involved. In that case the Court of Appeals for the Fifth Circuit, after stating that the duty of the Insurance Company to defend, must be determined by the allegations in the declaration in the suit against the insured, then said: 'We also think it is quite clear that if the Appellant had fully completed the work of installation of a gas heater, and that the fire had occurred thereafter by virtue of defects in the appliances fully installed, there

would have been no liability under the policy. Nevertheless, if the allegations of the plaintiffs were to the effect that the damage was caused by the negligence of the appellant in the installation or in the failure to exercise reasonable care in installing the instrumentalities for use in transmitting and utilizing so volatile a substance as gas, there would have been an obligation under the policy upon the insurer to defend the suits and to pay the amount of the judgments, costs, and expenses in the event of recoveries under such allegations."

CONCLUSION

The decision of the court below should be reversed and the appellant awarded judgment for the amounts as prayed for in its Complaint, as well as reasonable attorneys' fees to be therein determined.

Respectfully submitted,

WHEELOCK, RICHARDSON & NIEHAUS,

CLYDE R. RICHARDSON

Attorneys for Appellant

APPENDIX

At the commencement of the trial in the lower court, plaintiff offered the Complaint, together with the exhibits attached, as an additional plaintiffs exhibit to the Pre-Trial Order, and all of the plaintiff's and defendant's exhibits contained within the Pre-Trial Order were offered by the respective parties and allowed and made a part of the record. Appellee offered additional exhibits, which were allowed, but none of them appear in Appellant's Designation of Record on Appeal.

No. 16072

United States
COURT OF APPEALS
for the Ninth Circuit

TIDEWATER ASSOCIATED OIL COMPANY, a
corporation,

Appellant,

v.

NORTHWEST CASUALTY COMPANY, a cor-
poration,

Appellee.

BRIEF OF APPELLEE

*Appeal from the United States District Court for the
District of Oregon.*

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FILED

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PAUL P. O'BRIEN, CLERK

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BRIEF OF APPELLEE

*Appeal from the United States District Court for the
District of Oregon.*

JURISDICTION

This is an action on a policy of liability insurance commenced in the Circuit Court of the State of Oregon for Multnomah County, by Tidewater Associated Oil Company, a Delaware Corporation against Northwest Casualty Company, a Washington Corporation. The amount in controversy, after excluding interest and costs, is more than \$3000. The action was removed to the United States District Court for the District of Oregon upon defendant's petition. The District Court

had jurisdiction under 28 USCA Sec. 1332 and 28 USCA Sec 1441.

Findings of Fact, Conclusions of Law and Judgment in favor of appellee were entered. This court acquired jurisdiction under 28 USCA Sec. 1291.

STATEMENT OF THE CASE

Appellee executed and delivered to William Sherer a "Comprehensive Public Liability" policy of insurance with appellant Tidewater Associated Oil Company as an additional named insured, which policy was at all times in force.

On December 1, 1953 Ruth Buffington ordered some stove oil from Sherer and the same was delivered to her by truck the next day and put in a can which she provided. This can was placed on the back porch of her residence.

On December 3, 1953 she attempted to start a wood fire with the product delivered by Sherer and the same exploded, causing her personal injuries and property damage.

On September 12, 1955 she served upon appellant and others, a summons and complaint, in an action for the recovery of damages caused by the explosion and she alleged negligence and also breach of warranty.

Appellant tendered the defense of said action to appellee and it denied coverage under its policy and declined to defend.

Appellee's policy of insurance, in part, reads as follows (Findings of Fact IX, Tr. 38-39):

EXCLUSION OF PRODUCT LIABILITY

(EXCLUSIONS (A) AND (B) BELOW ARE APPLICABLE WHEN CHECKED.)

(X) (A) BODILY INJURY

It is agreed that the policy does not apply to bodily injury, sickness or disease, including death at any time resulting therefrom:

(X) (B) PROPERTY DAMAGE

It is agreed that the policy does not apply to injury to or destruction of property (including loss of use of such property):

if caused by the handling or use of, or the existence of any condition in goods or products manufactured, sold, handled or distributed by the Insured when the occurrence takes place away from the premises owned, rented or controlled by the Insured, and after the Insured has relinquished possession of such goods or products to others or if caused by operations if the accident occurs after such operations have been completed or abandoned at the place of occurrence (other than pick up and delivery, and the existence of tools, uninstalled equipment, and abandoned or unused material); provided, operations shall not be deemed incomplete because improperly or defectively performed or because further operations may be required pursuant to a service or maintenance agreement.

Subject, otherwise, to all the terms and conditions of the policy.

Attached to and hereby made a part of policy No. 880-7277 of the Northwest Casualty Company, of Seattle, Washington.

Appellant was also insured by a policy of insurance issued by Continental Casualty Company who, through some loan agreement with appellant, did employ counsel and settled the Buffington lawsuit against appellant and others for the sum of \$15,000. Attorney's fees and costs expended amounted to \$1010.73 (Findings of Fact X, Tr. 39-40).

This action was brought to recover the sums paid in settlement, plus costs and attorney's fees.

QUESTIONS PRESENTED

The principal question is whether appellee breached its contract in refusing to defend appellant in the action brought by Buffington. Appellee contends that the obligation to defend does not arise where the gravamen of a complaint against the assured relates to a claim which is clearly outside the policy coverage.

Another question involves the provision in the policy, "liability imposed by law" as it pertains to the payment of \$15,000 by appellant through Continental Casualty Company, in settlement of the Buffington claim.

SUMMARY OF ARGUMENT

The allegations of the Buffington complaint related to a claim for injuries and damages clearly outside the coverage of the policy issued by appellee.

Under a comprehensive liability policy requiring insurer to defend suits brought against the insured, but only as to coverage of the policy, which excludes therefrom injuries or damage caused by handling or use of a product, the insurer is not under a duty to defend or pay amount which insured voluntarily paid to settle claim.

Appellant was not obligated by law to pay Buffington \$15,000, and under the terms of the policy, appellee is not liable to it for such voluntary payment. Liability imposed by law means liability imposed in a definite sum by a final judgment against the insured.

ARGUMENT

POINT I

The Buffington claim was clearly outside the insurance coverage and for that reason there was no duty on the part of appellee to defend.

Appellant contends that the allegations in the Buffington complaint, even though they may refer to a claim partly within and partly without policy coverage, appellee, none the less, had the duty to defend.

The obligation to defend an action against the insured does not arise where it appears from the gravamen of the complaint that the claim is clearly outside the coverage. This conclusion was reached in the recent case of *MacDonald v. United Pacific Insurance Company*, 210 Or. 395, 311 P. 2d 425, where the insured brought an action against the defendant for breach of the provisions of a Personal Comprehensive Liability

Policy. Plaintiff set forth three causes of action all based upon the policy.

In the first he alleged that as a result of an altercation he was charged with assault and battery in the Municipal Court. He pleaded not guilty and called upon the defendant to defend him in that proceeding. Upon defendant's failure to do so, plaintiff was required to and did employ legal counsel for his defense in the Municipal Court action.

By his second cause of action plaintiff set forth the same altercation and alleged that as a result thereof three parties sued him for \$140,000 damages for assault and battery. Again plaintiff demanded that the defendant company defend him but defendant denied that the policy afforded any coverage and refused to assume the defense. Thereafter the plaintiff on advice of counsel settled all of said suits for the amount of \$2,750.00 and they were dismissed with prejudice. Plaintiff seeks that amount from defendant.

As his third cause of action he reiterated his previous allegations and alleged that by reason of defendant's refusal to defend him he was called upon to employ counsel for his defense and incurred costs and attorney's fees in the sum of \$1,590.50, for which sum he seeks judgment from the defendant.

In considering the issues raised, the Court said:

"The plaintiff's claims against the defendant company are of two kinds. By his first and third causes of action plaintiff seeks recovery for legal expenses, costs and attorney's fees incurred by him in defending the criminal and civil actions and rendered

necessary by reason of the alleged wrongful failure of the defendant company to assume the defense of those actions. By the second cause of action plaintiff seeks to recover the amount paid by him by way of a settlement of 'all said suits'. For the purpose of this case only, we shall treat the amount paid in settlement as being a sum which the insured plaintiff became 'obligated to pay by reason of the liability imposed upon him by law . . . for damages . . . because of bodily injury'. Coverage A. Our questions are these: (1) Was the defendant under a duty to assume the defense of the plaintiff, and (2) was it under a duty to pay to plaintiff the amount paid by plaintiff in settlement of the suits? . . .

"The question now arises as to whether the defendant company breached its contract in refusing to defend the plaintiff. The duty to defend is not dependent upon the merit or want thereof in the damage suit brought against the insured. If required to defend it must do so whether the suit be valid or groundless, false or fraudulent. But under the clear wording of the policy the duty to defend applies only 'As respects such insurance as is afforded by the other terms of this schedule under coverages A . . .'. Coverage A is limited by the exclusionary clause."

In this case at bar, appellee issued to Sherer, a comprehensive public liability policy which had attached to it the Exclusion of Product Liability. The duty to defend reads: "As respects such insurance as is afforded by the other terms of this policy . . ."

Whether appellee was required to defend appellant against the Buffington claim calls for consideration of the gravamen of her complaint. Both causes of action in her complaint related to personal injuries and property damage caused as a result of an explosion at the

Buffington residence by the handling or use of appellant's contaminated product.

In the first cause of action, it is alleged, that an order for stove oil was placed with appellant on December 1, 1953, and the same was delivered to the residence on December 2nd; that the plaintiff obtained a can and requested the delivery man to place a small quantity of stove oil, as ordered, in the can . . . thereupon said defendants took the hose located upon said truck and poured a petroleum product represented by said defendants to be stove oil, as ordered, in said can; thereupon, plaintiff placed said can and said contents as placed therein by defendant, upon the back porch of her home for later use in starting kitchen stove fires. The next day the plaintiff was required to start a fire in the wood stove, obtained the can which contained only the petroleum product delivered by defendants, and which plaintiff had placed on the back porch, and which had been represented to her as containing stove oil, struck a match and placed the same beneath the wood at the end of the fire box, and commenced to pour a small quantity of the petroleum product from said can upon the wood; that simultaneously, with the first small particle of the petroleum product coming in contact with the wood, the petroleum product from said can ignited and flamed with great force and exploded causing plaintiff serious injuries.

In the second cause of action, as an alternative cause, based upon breach of warranty, she alleged that defendants warranted the product sold was stove oil, but instead it was a dangerous mixture of gasoline.

Both causes of action are based on the undisputed fact that plaintiff had received complete possession of the alleged stove oil in a can provided by her and the same was placed upon the back porch of her home for later use.

Thus, there can be no dispute, the delivery of the product from the truck had been completed and no harm resulted therefrom. The harm to Buffington resulted solely from the *handling* or use of an alleged contaminated product the day following its delivery to her. Upon the allegations of her complaint, therefore, no claim was stated within the coverage of the policy of insurance.

In *Remmer v. Glens Falls Indem. Co.*, 140 Cal. App. 2d 84, 295 P. 2d 19, 57 ALR 2d 1379, the court said:

"Appellants also contend that, regardless of whether the policy covered the damage involved, respondent was obligated by the policy to undertake the defense of the appellants in the action brought against them by the Morrisises. The defense clause of the policy has already been quoted. It required the respondent to defend the insured in any action alleging any injury under the policy 'even if such suit is groundless, false or fraudulent'. Under such a clause it is the duty of the insurer to defend the insured when sued in any action where the facts alleged in the complaint support a recovery for an 'occurrence' covered by the policy, regardless of the fact that the insurer has knowledge that the injury is not in fact covered. *Lee v. Aetna Casualty & Surety Co.*, 2 Cir. 178 F. 2d 750; *Employers Mut. Liability Ins. of Wis. v. Hendrix*, 4 Cir. 199 F. 2d 53. But it is equally true that the insurer is not required to defend an action against the insured when the complaint in that

action shows on its face that the injury complained of is not only not covered by, but is excluded from, the policy. *Farmers Cooperative Soc. No. 1 v. Maryland Cas. Co.*, Tex. Civ. App., 135 SW 2d 1033. That is the present case."

In *Journal Publishing Co. v. General Cas. Co.*, 210 F. 2d 202, the Ninth Circuit Court of Appeals said:

"There are also decisions in which the insurer has been held liable to the insured both to satisfy the liability to the third person and to defend the third person's action. In those cases the allegations of the third person's complaint disclosed *claims* within the coverage of the policy. But, as we have previously suggested, no court has held that merely because of this state of the pleadings the insurer is obligated not merely to defend but also to pay if recovery is had. In such cases the obligation of payment has been predicated upon the court's determination that as a matter of fact the liability and the damages claimed by the third person were within the policy's coverage." (Citing authorities) (Emphasis supplied).

Appellant cites *Employers Liab. Assur. Corp. v. Youghiogheny and Ohio Coal Co.* (CCA 8), 214 F. 2d 418, on the question of duty to defend. The policy there involved contained a product liability exclusion. The Court pointed out, however, that the claim arose as the result of a *defective car door* and did not result from handling the product of the insured—namely coal. Consequently the product liability exclusion was not involved and the insurance company should have defended. The facts in that case are distinguishable and are not comparable to this case at bar. If the coal car had blown up, as a result of a defective product, the exclusion would have clearly applied.

POINT II

The exclusion endorsement exempts liability for injuries caused by the "handling" or "use" of a product . . . when the occurrence takes place away from the premises of the insured.

In this regard, the Exclusion endorsement of the policy has this language:

"It is agreed that the policy does not apply to bodily injury, sickness or disease . . . : if caused by the handling or use of, or the existence of any condition in goods or products manufactured, sold, handled or distributed by the Insured when the occurrence takes place away from premises owned, rented or controlled by the Insured, and after the Insured has relinquished possession of such goods or products to others . . ."

The above endorsement clearly exempts coverage for bodily injury or damage caused by the handling or use of or the existence of any condition in goods or products manufactured, sold, handled or distributed by the appellant.

Philadelphia Fire & Marine Ins. Co. v. City of Grandview, 42 Wash. 2d 357, 255 P. 2d 540, gave consideration to a policy of insurance with identical language as appears in this policy at bar. Appellant cites that case in its brief and fairly outlines the salient facts. That case supports appellee. In finding that the products liability exclusion was not applicable to the facts, since the City of Grandview was not manufacturing or selling gas, the Court said:

" . . . The negligence of the city in permitting a dangerous concentration of gas to be introduced into the house is the basis of the judgment against

the city. It is true that the gas was negligently introduced into the house by the same vehicle that delivered water to the house; but it does not necessarily follow that it thus attained the same status. *This is not a case involving the sale of a contaminated product.* It is this fact which distinguishes it from the authorities cited . . . wherein dynamite caps had been mixed with coal. . . ." (Emphasis added).

Appellant cites *A. R. Heyward, II, and C. D. Tucker, doing business as W. B. Guimarin & Co. v. American Casualty Company of Reading*, 129 F. Supp. 4. That case is clearly distinguishable. It involved a situation where the insured had a subcontract on a housing project for the plumbing and heating portion thereof, and which involved the construction of underground gas lines. Before the housing project was fully completed, a portion of it was occupied, when an explosion occurred in one of the apartments, causing personal injuries to a person, who thereafter brought action against the insured. The court found that the allegations of the complaint for injuries were clearly based upon a negligent construction, and not upon a claim relating to a defective product.

In this case at bar it should be noted, that the Exclusion endorsement reads:

" . . . when the occurrence takes place away from the premises owned, rented, or controlled by the Insured, . . . "

The above language has been considered in the following cases:

Loveman, Joseph & Loeb v. New Amsterdam
Cas. Co., 233 Ala. 518, 173 So. 7.

Standard Acc. Ins. Co. v. Aberts (CCA 8), 132 F. 2d 794.

Farmers Co-op. Soc. v. Maryland Cas. Co., 135 SW 2d 1033.

Carter v. Nehi Beverage Co., 329 Ill. App. 329, 68 NE 2d 622.

Lyman Lumber & Coal Co. v. Travelers Ins. Co., 206 Minn. 494.

In *Loveman, Joseph & Loeb v. New Amsterdam Cas. Co.* supra, the policy involved provided that it did not cover any accident "caused directly or indirectly by the possession, consumption, handling or use, elsewhere than upon the premises described."

The party injured discussed the merits of a sun tan lotion with the plaintiff's clerk, after which the clerk delivered a preparation which was not to be used in the sun. This precaution was not observed by the injured party. The Court held that under the very clear and unambiguous terms of the policy it did not cover accidents "caused directly or indirectly by the possession, consumption, handling or use, elsewhere than upon the premises described in the schedule of statements, of any goods, article or product, manufactured, handled or distributed by the assured." The court further stated that since the accident was not caused by the possession, consumption, handling or use of the preparation given to the injured party upon the plaintiff's premises, there was, under the limitation clause of the policy, no liability upon the insurer.

In *Standard Acc. Ins. Co. v. Roberts*, supra, it appeared that the business of one of the defendants was the sale and installation of furniture and fixtures, and that

he sold a certain person a gas-operated refrigerator and installed it in the purchaser's residence, the installation being completed by coupling up the refrigerator to the gas pipes in the house; during the following night, the householder, his wife, and children were injured by gas escaping from such refrigerator connections.

After stating that it did not need to determine whether installations in residences was within the coverage, the court went on to say that even if it should be, the provision of the "Products of Completed Operations" clause, quoted above, clearly excluded the occurrence in question from coverage because it happened away from the insured's "premises;" it resulted from the existence of a "condition in premises or property caused by operations of the insured;" the accident occurred "after the completion . . . of such operations at the place of occurrence thereof and away from premises owned, rented or controlled by the insured;" and it was not caused by "tools, uninstalled equipment and abandoned or unused material."

An endorsement to the policy excluded liability for an accident occurring after the insured had relinquished possession thereof to others and away from the premises owned, rented and controlled by him, and also excluded the existence of any condition in premises or property away from those of the insured.

In *Farmers Co-op Soc. v. Maryland Cas. Co.*, supra, it appeared that the plaintiff operated a gasoline station in connection with a cotton gin, and that the person injured was a customer of the plaintiff and purchased

what he thought was a 5-gallon can of kerosene, but the container being filled by mistake with gasoline or a mixture of gasoline and kerosene, the liquid delivered was much more inflammable and explosive than kerosene, and while the customer's wife was filling a lamp with the liquid, an explosion occurred, causing her clothes to catch fire. While the husband was attempting to extinguish the flames, he inhaled flames, gases, and vapors, which irritated his throat and lungs so that pneumonia developed, resulting in his death. The court rejected the contention of the plaintiff that the "use" of the liquid purchased by the deceased began upon the premises of the plaintiff, on the ground that the policy plainly provided that it did not cover accidents caused by the use of goods handled by the plaintiff elsewhere than upon its premises.

In *Carter v. Nehi Beverage Co.*, supra, one who had recovered a default judgment in an action for personal injuries caused by an exploding bottle of pop, sought to garnish the tortfeasor's public liability insurer, which denied any indebtedness to the insured as a result of the litigation in question. The complaint against the bottling company alleged that it conducted its business in Elgin and that the bottle exploded at the wayside stand of plaintiff's aunt in Wauconda. In affirming the judgment below discharging the garnishee, the court expressed doubt that the accident in question came within the insuring clauses of the policy; then observed that, assuming it did, "we are confronted by the exclusion clause which follows;" and quoted the language referred to: "This policy shall not cover loss

from liability for . . . injuries or death: . . . (4) Caused by . . . the consumption of any article or product manufactured, handled or distributed by the Assured *elsewhere than upon the Assured's premises.*"

In *Lyman Lumber & Coal Co. v. Travelers Ins. Co.*, 206 Minn. 494, 289 Ia. 40, the facts indicated that William Hullsiek ordered from Lyman Lumber & Coal Company a ton of coal which was delivered and unloaded in Hullsiek's coal shed a few days before the accident and injuries to a minor as the result of fuse caps containing dynamite delivered in the coal. The lumber company held public liability policies issued by the defendant insurance company, which policies excluded (c)

"the possession, consumption, or use elsewhere than upon the Insured Premises of any article manufactured, handled, or distributed by the Assured unless covered hereunder by written permit endorsed on this Policy."

Hullsiek brought an action against the lumber company and alleged acts of negligence in carelessly delivering coal containing dynamite caps and failing to remove said caps or warn Hullsiek, such negligent acts being done when the assured knew or should have known that the caps were attractive to children, and that by reason of said explosion caused by its negligence the minor was injured.

The lumber company tendered the defense of the actions to the defendant insurance carrier claiming to be protected by the policies. The defendant took the position that the policies of insurance did not afford

coverage and declined to defend. The lumber company successfully defended the Hullsiek case and brought action against the insurance carrier to recover the costs expended.

The court found that the possession and use elsewhere of the coal than on the insured premises was within the exclusion provisions of the policy and that the insurer was not obligated to defend the action. It would only be bound to defend the assured against *claims* as would, if proved, *create liability* against which the insurer would be bound to indemnify the assured.

In this case at bar, the Exclusion of Products Liability endorsement has this language:

“ . . . or if caused by operations if the accident occurs after such operations have been completed or abandoned at the place of occurrence . . . ”

If delivery of the stove oil purchased is regarded as an operation, such operation was concluded on December 2, 1953 when it was placed on the porch in the Buffington can, and the policy exempted coverage for the accident occurring the next day.

In *U. S. Sanitary Specialties Corp. v. Globe Indemnity Co.*, 204 F. 2d 774 (CCA 7), the court said:

“To determine just what coverage was thus excluded from this policy we must consider the definition of the hazard, ‘Products (Including Completed Operations),’ which we find defined in the policy under the title, ‘Definitions,’ as follows:

“(c) Products Hazard. The term “products hazard” means

“(1) the handling or use of, the existence of any condition in . . . goods or products manu-

factured, sold, handled or distributed by the named insured, . . . if the accident occurs after the insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the insured . . . ;

“(2) operations, if the accident occurs after such operations have been completed or abandoned at the place of occurrence thereof and away from premises owned, rented or controlled by the insured, except . . . (b) the existence of tools, uninstalled equipment and abandoned or unused materials . . . provided, operations shall not be deemed incomplete because improperly or defectively performed . . . ”

* * *

“It also seems clear that in this case the ‘operation’ of the plaintiff here involved—the demonstration of its wax product by the county officials to induce a purchase of the product by the county officials—had been completed when the personal injury plaintiff slipped and fell. The small area on the floor was waxed on December 1, 1951. On December 10, 1951, as a result of the demonstration, the county officials made a purchase of the wax product, and on the following day, December 11th, the accident occurred.

“The selling of this type of wax product was a regular part of plaintiff’s business. A demonstration of the product to induce purchases was a regular operation in the course of plaintiff’s business. This particular demonstration was, at the time of the accident, a ‘completed or abandoned’ operation within the meaning of the policy definition of ‘operation’ given in Paragraph (2) under ‘Products Hazard.’ ”

POINT III

Appellant was not obligated to pay Buffington for there was no liability imposed upon it by law.

Appellant is bound by the terms of the policy. The "Insuring Agreements" of the policy has this provision:

Bodily Injury
and Property
Damage
Liability.

- (1) To pay on behalf of the Insured, all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law. . . .

Appellant was not obligated by law to pay Buffington the sum of \$15,000, accordingly appellee is not liable to it for the amount of such payment.

In *Girard v. Commercial Standard Ins. Co.*, 66 Cal. App. 2d 483, 152 P. 2d 509, the court held that the term "liability imposed by law" as used in an automobile liability policy is ordinarily construed to mean liability imposed in a definite sum by a final judgment.

The Court stated:

"Under the rules enunciated in the authorities cited, we cannot escape the conclusion that the policy before us 'was simply an undertaking to pay any final judgment which the injured person might obtain against the assured, and that the obtaining of such final judgment constituted a condition precedent to any action which the injured person might have against the insurance carrier.' "

To the same effect is found in *Philadelphia Fire & Marine Ins. Co. v. City of Grandview*, supra, where the Court said:

"In order to establish its right to recover under the insurance policy, respondent must prove: (a)

that a liability has been imposed upon the city by law; (b) that the facts upon which liability was based established a situation within the terms of the policy; and (c) the amount of the judgment."

CONCLUSION

The allegations in the Buffington complaint clearly showed that her claim arose out of the handling and use at her residence of a contaminated product. This claim was outside the coverage of the policy of insurance and appellee did not have the duty to defend the action or pay the amount of the settlement made by appellant.

Appellant has not complied with Rule 18(2)(d) of the Rules of this court requiring it to set forth in its brief a specification of errors relied upon and particularly each error intended to be urged. For this reason it has been difficult for appellee to determine precisely the error relied upon by appellant in this appeal.

The judgment should be affirmed.

Respectfully submitted,

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NO. 16072

United States
COURT OF APPEALS
for the Ninth Circuit

TIDEWATER ASSOCIATED OIL COMPANY,
a Corporation,

Appellant,

vs.

NORTHWEST CASUALTY COMPANY,
a Corporation,

Appellee.

APPELLANT'S REPLY BRIEF

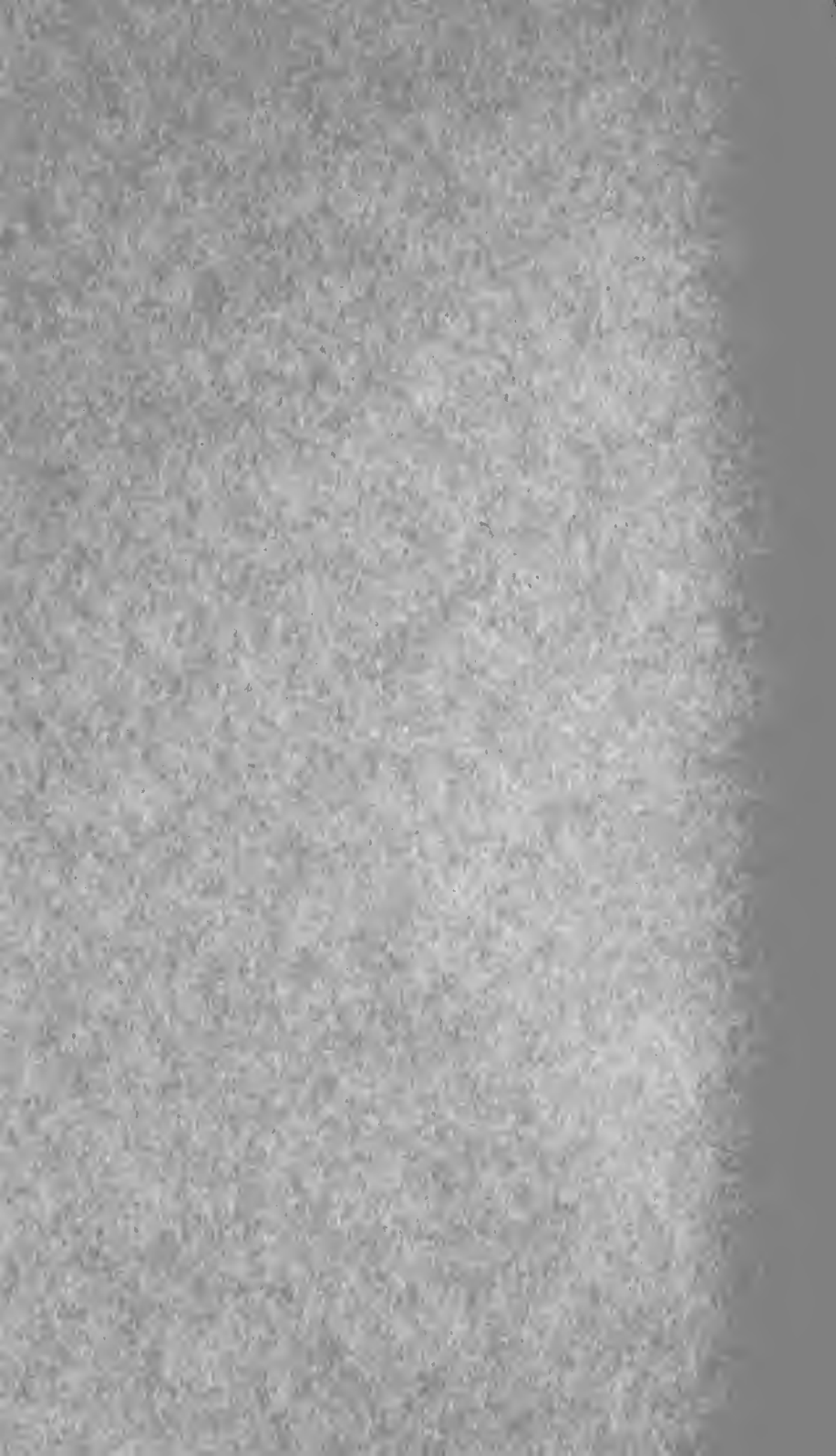
*Appeal from the United States District Court
for the District of Oregon.*

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United States
COURT OF APPEALS
for the Ninth Circuit

TIDEWATER ASSOCIATED OIL COMPANY,
a Corporation,

Appellant,

vs.

NORTHWEST CASUALTY COMPANY,
a Corporation,

Appellee.

APPELLANT'S REPLY BRIEF

*Appeal from the United States District Court
for the District of Oregon.*

SUMMARY OF ARGUMENT

1. Even though a complaint against the insured asserts a cause of action upon various grounds which are not within the coverage of the policy, the duty to defend arises from any allegations setting forth the cause of action which might be within the coverage.

II. The endorsement entitled "Exclusion of Product Liability" is confined to goods or products manufactured, sold, handled or distributed by an insured.

III. The term, "liability imposed by law" does not prevent the insured from recovery under the policy if insured settles and compromises a claim after the insurer wrongfully refuses to accept coverage under terms of policy.

ARGUMENT

I. Even though a complaint against the insured asserts a cause of action upon various grounds which are not within the coverage of the policy, the duty to defend arises from any allegations setting forth the cause of action which might be within the coverage.

Appellee first argues that the obligation to defend an action against the insured does not arise where it appears from the gravamen of the complaint that the claim is *clearly* outside the coverage. (Appellee's Brief, P 5). This is a conclusion which is not supported by the allegations of the Buffington Complaint, for it could well have been determined by a court or jury that the proximate cause of the accident and injury to the complainant was the use of faulty equipment by the insured, but for which no accident would have occurred.

Appellee, in support of its contention, cites the case of *MacDonald v. United Pacific Insurance Company*, 210

Or. 395, 311 P2d 425, (Appellee's Brief, P 5), which case was not purposely omitted but inadvertantly not listed in Appellant's Brief. This case in no way contradicts appellant's argument. But in fact supports appellants contention. The actions brought against MacDonald were for assault and battery, which as the court stated was by its very essence an allegation that MacDonald was guilty of an *intentional* attempt by force and violence to do an injury to the person of another, coupled with the present ability to carry the intention into effect, and consummated by hostile, unpermitted physical contact with the person. (P 399). The policies specifically excluded "injury * * * caused *intentionally* by * * * the insured."

Appellee, as a final point, cites a case which appellant referred to, which is the case of *Employers Liability Assurance Corp., Ltd., v. Youghioghney & Ohio Coal Co.*, (CCA 8) 214 F2d 418. Appellee, in commenting on this case, becomes trapped in its own language, in that it fails to distinguish between defective or faulty equipment and a defective product. The court in the *MacDonald case*, supra, considered the companion case, *Youghioghney & Ohio Coal Co. v. Employers' Liability Assurance Corp.*, Minn. 1953, 114 F. Supp. 472, and stated on Page 406 as follows:

"If in the pending case the injured parties had sued the plaintiff by a complaint asserting both negligent injury and assault and battery, a different problem would have been presented and it might have

been the duty of the insurer to defend at least until it was established that the injury was intentional. The decision in the Youghioghenny case was based on the finding that a part at least of Burnett's Complaint did allege facts which fell within the coverage of the policy. The coal company was therefore entitled to recover both the amount paid by it in settlement and the expense incurred in defending Burnett's suit."

In the case at hand, therefore, we are not called upon, as appellee claims at Page 7 of Appellee's Brief, "for consideration of the gravamen of her complaint," but rather to consider the specific charges found in the Buffington Complaint, and appellant contends that use of faulty equipment states a cause of action within the general insuring clauses of the insurance contract and not excluded under the products exclusion endorsement.

II. The endorsement entitled "Exclusion of Product Liability" is confined to goods or products manufactured, sold, handled or distributed by an insured.

Appellee first contends that the case of *Philadelphia Fire & Marine Insurance Co. v. City of Grandview*, 42 Wash. 2d 357, 255 P2d 540, and the case of *A. R. Heyward II and C. D. Tucker*, doing business as *W. B. Guimarin & Company v. American Casualty Company* of Reading, Pennsylvania, 129 F. Supp 4, (Appellee's Brief, Pp 11, 12) are cases which, although cited by appellant, support appellee. The appellee again fails to distinguish between defective or contaminated products manufactured, sold, handled or distributed by an insured which give rise to an accident causing injuries to a third person and acci-

dents causing injuries which stem from the use of faulty equipment. The proximate cause of the injuries in the two above-cited cases were thus distinguished by the courts and certainly support appellant's contentions. In the *City of Grandview case*, supra, the city was not manufacturing or selling gas, and the court held that the proximate cause was the negligence of the city in permitting the gas to be introduced into the injured party's home and that this was not in any way a product manufactured, sold, handled or distributed by the insured, and in the *Heyward case*, supra, the court held that the allegations of the complaint and the proximate cause of the injury was the negligent construction of the plumbing and heating portions of a housing project and that there was no claim that the products installed were defective products in any way.

Appellee, in support of its argument, cites the following cases:

Loveman, Joseph & Loeb v. New Amsterdam Cas. Co., 233 Ala. 518, 173 So. 7.

Standard Acc. Ins. Co. v. Aberts (CCA 8), 132 F. 2d 794.

Farmers Co-op. Soc. v. Maryland Cas. Co., 135 SW 2d 1033.

Carter v. Nehi Beverage Co., 329 Ill. App. 329, 68 NE 2d 622.

Lyman Lumber & Coal Co. v. Travelers Ins. Co., 206 Minn. 494.

Appellant has read each of the above-cited cases, and not one of them has any act of negligence alleged, contending that the proximate cause of any accident and

injury is the result of the use of faulty equipment by the insured. The cases, therefore, are not in point. Appellee again fails to consider the point of appellant as upheld by the cases cited by appellant to the effect that faulty equipment is not "goods or products manufactured, sold, handled or distributed by the insured."

Appellee further contends that if the purchase by Buffington is regarded as operations, the operation was concluded on the date of delivery and an accident occurring the following day was exempted from coverage under this policy. (Appellee's Brief P. 17). Should this court consider this argument, we refer to the case of *Reed Roller Bit Co. v. Pacific Employers Ins. Co.*, 5 Cir., 198 F. 2d 1.

The plaintiff, Reed Roller Bit Company, appealed from a judgment in favor of the defendant to dismiss the complaint for failure to state a claim upon which relief could be granted to plaintiff. It involved an action upon a liability insurance policy to cover expenses, attorneys fees and money paid by plaintiff in settlement of an action brought against it for negligence in representing that a certain abrasive wheel of another company, when used upon Reed's grinding machine, was not dangerous, whereas as a matter of fact, it was dangerous and not safe to use on Reed's machine, and an injury occurred as a result of said use. One of the grounds of negligence charged was the representation by the employee that the article was safe for use and was being used at the time of the accident wherein it was not safe for the purpose intended. The plaintiff contended that by reason of this allegation of negligence,

the company became bound and obligated under the terms of the policy to pay any damages recovered or paid in good-faith settlement within the policy limits.

The policy contained within it a products clause almost identical to that of the case in hand. It further contained a premises-operations coverage clause covering operations which were necessary to the ownership, maintenance or use of the premises. The District Court concluded that the negligence charged against Reed was with respect to one of its products, and the Appellate Court held this to be error in that the negligence charged against Reed was with respect to the acts and representations of Reed's agent and salesman. The court stated as follows:

“* * * Considering the alleged representations of Reed's Agent to be ‘operations’ were they operations which had been completed before the accident occurred such as would come within the coverage under ‘Products’ and be excluded from the coverage under ‘Premises-Operations’? To answer in the affirmative would result in relieving the Insurance Company from any liability for negligence representations of the agents or salesmen of the insured because, of course, no person could be injured as a result of acting upon a negligence representation until after the representation had been made to him.

“We hold that an operation consisting of a negligent representation made for the purpose of or reasonably calculated to induce action *is not completed until the person to whom the representation is made acts in reliance upon that representation.*

“The result follows that the plaintiff's complaint states a claim upon which relief can be granted, and that the judgment of the District Court dismissing

said complaint is reversed and the cause remanded for trial.”—(Italics ours).

The *Reed Roller Bit* case, *supra*, was decided in Texas by the United States Court of Appeals twelve years after the Texas case of *Farmers Co-op. Soc. v. Maryland Cas. Co.*, 135 SW 2d 1033, *supra*, cited by appellee, and does not even make reference thereto.

Also, in the case of *Ocean Accident & Guaranty Corporation, Ltd., v. Aconomy Erectors, Inc., and Roy J. Green, Administrator of the Estate of John A. Green, deceased*, (United States Court of Appeals, 7th Cir., June 21, 1955) 224 F. 2d, 242, the question was raised as to whether or not the work of an Insured upon a building had been completed at the time of a fatal accident so as to deny coverage under the policy by reason of a provision in the policy as to completion of operations under provisions similar to those in other cases cited herein and the action at hand. The allegation of the plaintiff in the action brought against the Insured was that the injury to the deceased was caused by “Imperfect and Negligent Construction of the Welding and Placing of the said steel beams by” (Defendant-Insured). The court, after determining that a real factual issue had been raised as to the material facts in the case sufficient that the court could not grant a summary judgment as had been done in the lower court, stated as follows:

“2. A careful reading of the policy raises another question which might be controlling in this case. The true meaning of the policy is difficult to determine. An examination of it involves a physical effort of no

mean proportions. Starting out with three printed pages, the first of which consists largely of a form which is filled in on a typewriter, the reader is confronted also with six physically attached supplements, or riders, inconveniently assorted into different sizes. If he is possessed of reasonable physical dexterity, coupled with average mental capacity, he may then attempt to integrate and harmonize the dubious meanings to be found in this not inconsiderable package. A confused attempt to set forth an insuring agreement is later assailed by such a bewildering array of exclusions, definitions and conditions, that the result is confounding almost to the point of unintelligibility. To describe the policy as ambiguous is a substantial understatement. To ascertain its meaning we are forced to seek refuge in the well settled rules that insurance contracts are to be construed liberally in insured's favor and strictly against the insured. (Citing Cases) and conditions and stipulations in the policy are to be construed most strictly against the insurance company (Citing Cases).

“Guided by these rules, it might reasonably be claimed that there emerges through the confusing language and the shapeless masses of words before us, an intention to protect Aconomy from the commonplace risks incidental to the business of a construction contractor. Was that the protection for which Aconomy paid a premium? If it could be deduced that the meaning of the policy is that the building under construction, to the extent that it was controlled by Aconomy in doing its work under contract with Svejcar, was the premises covered by the policy, and the work done there by Aconomy constituted the operations, the hazards of which were insured, it might be seriously contended that Aconomy was and is entitled to the protection of the policy insofar as the Green Accident is concerned.

“It might be in good faith argued that there were no ‘products’ insured by this policy, because the word,

'Products' was intended to refer to articles made by an insured and offered for sale, and further, that there is therefore no occasion to consider the argument of plaintiff in regard to the definition of 'products hazard' contained in the policy and, for the same reason, the question of whether the operation of Aconomy had been completed at the time of Green's accident, is immaterial."

Appellant contends that the Reed Roller Bit case and Ocean Accident case are cases wherein the acts of negligence did not relate to products or a condition in goods or products manufactured, sold, handled or distributed by the insured.

By analogy, it cannot be said that appellant manufactured, sold, handled or distributed, within the language of the products exclusion rider, *faulty equipment*.

III. The term, "liability imposed by law" does not prevent the insured from recovery under the policy if insured settles and compromises a claim after the insurer wrongfully refuses to accept coverage under terms of policy.

Appellee claims that the provision in the policy that insurer would only pay such sums for and on behalf of insured that insurer would become obligated to pay by the liability imposed upon him by law, prevents recovery by the appellant herein for the reason that appellant was not obligated by law to pay Buffington the sum of \$15,000.00, and further, that liability imposed by law means the "amount of final judgment." (Appellee's Brief, P. 19). This is not the law.

In support of this contention, Appellee cites: *The Philadelphia Fire & Marine Insurance Co. v. City of Grandview case*, and *Girard v. Commercial Standard Ins. Co.* (Appellees Brief, P 19). Appellant does not take issue with either of these cases, but does state that the said cases are not at all in point with the case at hand.

It is the contention of the Appellant that where a complaint alleges facts which represent a risk outside of the coverage of the policy, but also avers facts as in the Buffington complaint, which if proved, represent a covered risk, the insurer is under a duty to defend and in failing to contend the insurer is responsible to reimburse the insurer for the amount of any reasonable settlement, together with the insured's expenses relative thereto.

It is a well-settled rule of law that where an insurance company denies liability and refuses to defend an action, the insurer has the right, provided he acts in good faith and with due care and prudence, to enter into a compromise and settlement, and thereafter proceed against the insurer for amounts expended in the defense of the suit as well as the amount for which the cause was settled and compromised. The courts generally hold that an insurer may avail itself of a "reservation of rights" and proceed to defend the suit until such time as it may deem that it has no liability. To refuse to defend when there is liability is a breach of contract, and the insured may proceed to settle and compromise the action even though the policy provides otherwise.

8 Appleman Ins. L. & P., Paragraph 4690, Page 13 and Paragraph 4694, Page 62.

Youghiogheny & Ohio Coal Co. vs. Employers' Liability Assur. Corp., Ltd, 114 F. Supp 472.

Continental Casualty Co. v. Shankel, CCA 8, Okl. 1937, 88 F2d 819.

Hardware Mutual Casualty Co. v. Hilderbrandt, C. A. Okl. 1941, 119 F2d 291.

Basta v. United States Fidelity & Guaranty Co., 107 Conn. 446, 140 A 816.

The Court below, in the instant case, has already determined that the settlement was a fair and reasonable one and that the costs and attorneys' fees expended in the defense and settlement of the Buffington case were fair and reasonable.

CONCLUSION

The allegations of negligence set forth in the Buffington Complaint were such as were covered under the general insuring agreements of the Comprehensive Public Liability Policy written by appellee and upon which appellant appeared as a named insured. The decision of the court below should be reversed and the appellant awarded judgment for the amounts as prayed for in its Complaint, as well as reasonable attorneys' fees to be therein determined.

Rule 18 (2) (d) of the rules of this court are to the effect that when findings are specified as error, the specifications shall state *as particularly as may be* wherein the findings of fact and conclusions of law are alleged to be erroneous. An examination of the transcript of record on appeal will

reveal that the sole question in controversy has been the contention by appellant and the denial by appellee that the acts of negligence set forth in the Buffington Complaint were within the general insuring agreements of the policy and not affected by the products exclusion endorsement. The decision of the lower court, as set forth in its opinion, (R., p 36) determined this question adverse to appellant. Appellant appealed from the findings of fact and conclusions of law based upon this opinion and the judgment entered therein, as set forth in appellant's "STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL," (R., pp 42, 43), "STATEMENT OF THE CASE," (R., pp 2, 3, 4), and "STATEMENT OF POINTS TO BE URGED" (Appellant Brief, P 4). All other matters were resolved. Appellant feels it has substantially complied with the rule as set forth and cannot ascertain wherein appellee has been unduly burdened.

Respectfully submitted,

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No. 16074 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAM TITLE, aka Sam Teitelman,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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FILED

OCT 17 1958

PAUL P. O'BRIEN, CL

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No. 16074
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

SAM TITLE, aka Sam Teitelman,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

Jurisdiction.

In an action instituted by appellee [R. 2-10]¹ the court below on July 12, 1955, entered judgment revoking the order admitting appellant to citizenship and cancelling his certificate of naturalization [R. 30-31]. The District Court had jurisdiction to entertain appellee's action and to enter the aforementioned judgment pursuant to Section 340(a) of the Immigration and Nationality Act, 66 Stat. 260, 8 U. S. C. A. Sec. 1451(a).²

¹"R" indicates references to the typed Transcript of Record. "Br" indicates references to Appellant's Opening Brief.

²The second Cause of Action alleged jurisdiction under the provisions of Section 338(a) of the Nationality Act of 1940 as continued in force and effect by Section 405(a) of the Immigration and Nationality Act; and the District Court also assumed jurisdiction on this basis. However, since for the purposes of the instant appeal the two statutes are the same (*United States v. Zucca*, 351 U. S. 91, 94 (1956)), the present brief will only discuss Section 340(a) of the Immigration and Nationality Act.

On May 22, 1958 appellant moved the court below to set aside and vacate the denaturalization judgment entered on July 12, 1955 on the ground that the judgment was void in that the required affidavit of a showing of good cause was never filed and that it was no longer equitable that the judgment should have prospective application [R. 36]. On May 26, 1958 appellant also moved the District Court to dismiss appellee's complaint on the ground that the Court had no jurisdiction over the subject matter [R. 38]. The court below had jurisdiction to entertain appellant's motion to set aside and vacate the denaturalization judgment pursuant to Rule 60(b)(4) and (5), Federal Rules of Civil Procedure. Appellee knows of no jurisdictional basis for appellant's motion to dismiss complaint, and appellant cites none in his Opening Brief.

Since the order of the District Court denying appellant's motion [R. 43] was a final decision, this Court has jurisdiction of an appeal from that decision pursuant to Title 28, United States Code, Section 1291.

Statement of the Case.

On October 21, 1954, appellee filed a complaint in the court below seeking to revoke and set aside the order admitting appellant to citizenship and to cancel his certificate of naturalization [R. 2-10]. No affidavit showing good cause was filed with the complaint or thereafter made a part of the record. Appellant attacked the Court's jurisdiction because of the absence of the affidavit in a motion to dismiss the complaint [R. 12, 14] and in his answer [R. 27]. The District Court ruled against appellant on this jurisdictional issue [R. 23] and on July 12, 1955 entered judgment against appellant, revoking the order ad-

mitting him to citizenship and cancelling his certificate of naturalization [R. 30-31].³

On September 8, 1955 appellant filed a Notice of Appeal from the denaturalization judgment [R. 32]; however, on February 27, 1956 this Court issued its mandate ordering the appeal dismissed "for failure of appellant to prosecute the appeal" [R. 33-34]. This Court's mandate was filed and spread upon the records of the District Court on February 29, 1956 [R. 35].

On April 30, 1956 the Supreme Court decided *United States v. Zucca*, 351 U. S. 91, and on April 7, 1958 the Supreme Court decided the *Matles*, *Lucchese*, and *Costello* cases⁴ holding that the affidavit "must be filed with the complaint when the proceedings are instituted" (356 U. S. at p. 257).

On May 22, 1958 appellant moved the court below to set aside and vacate the denaturalization judgment entered on July 12, 1955 on the ground that the judgment was void in that the required affidavit showing good cause was never filed and that it was no longer equitable that the judgment should have prospective application [R. 36]. On May 26, 1958 appellant also moved the District Court to dismiss appellee's complaint on the ground that the Court had no jurisdiction over the subject matter [R. 38]. On June 19, 1958 the court below entered an order denying appellant's motions [R. 43]. The instant appeal is taken from that order [R. 44].

³The opinion of the District Court is reported: *United States v. Title*, 132 Fed. Supp. 185 (S. D. Calif., 1955).

⁴*Matles v. United States*, No. 378; *Lucchese v. United States*, No. 450, and *Costello v. United States*, No. 494, all reported at 356 U. S. 256.

Issues Presented.

1. Is the denaturalization judgment void?
2. Did the District Court err in denying appellant relief under Rule 60(b)(5), Federal Rules of Civil Procedure.

Statutes and Rules.

Section 340(a) of the Immigration and Nationality Act, 66 Stat. 260, 8 U. S. C. A., Sec. 1451(a), provides in pertinent part:

“Sec. 340(a). It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: * * *”

Rule 60(b), Federal Rules of Civil Procedure, provides in part:

“(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may re-

lieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C. §1655, or to set aside a judgment for fraud upon the court. * * *

ARGUMENT.

I.

The Denaturalization Judgment Is Not Void.

A. The Affidavit Requirement Is Not Jurisdictional.

The Supreme Court did not hold that the affidavit requirement of Section 340(a) of the Immigration and Nationality Act is jurisdictional. *United States v. Zucca*, 351 U. S. 91 (1956), merely holds that the affidavit is “a procedural prerequisite to the maintenance of proceedings” (351 U. S. at p. 99); but nowhere suggests that it is a jurisdictional prerequisite.

The Supreme Court’s *per curiam* order in the *Matles*, *Lucchese*, and *Costello* cases⁵ merely clarified the *Zucca* opinion by ruling that the affidavit “must be filed with the complaint when the proceedings are instituted” (356 U. S. at p. 257). The Supreme Court has consistently and studiously avoided characterizing the affidavit requirement as jurisdictional.

Appellant in his Opening Brief (Br. 3-4) relies upon the word “prerequisite” employed by the Chief Justice in *Zucca*, to show that the affidavit requirement is jurisdictional. The terms “jurisdiction” and “jurisdictional,” however, are well established concepts in our jurisprudence. Had the Supreme Court deemed the affidavit requirement jurisdictional, it would have so stated in the language customarily employed to express these concepts.

⁵*Matles v. United States*, No. 378; *Lucchese v. United States*, No. 450, and *Costello v. United States*, No. 494, all reported at 356 U. S. 256.

B. The Determination by the District Court That It Had Jurisdiction Is Res Judicata.

Even if the affidavit requirement be regarded as jurisdictional in the sense that suit could not be maintained without it, the ruling of the District Court that it had jurisdiction is not of the sort to render its judgment void, and thus subject to attack under Rule 60(b)(4), Federal Rules of Civil Procedure.⁶ Aside from such fundamental jurisdictional elements such as service of process, a Court's determination that it has jurisdiction is *res judicata* and subject to review only on appeal.

United States v. Williams, 341 U. S. 58 (1951);

Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371 (1940);

Stoll v. Gottlieb, 305 U. S. 165 (1938);

American Surety Co. v. Baldwin, 287 U. S. 156 (1932);

Baldwin v. Traveling Men's Assn., 283 U. S. 522 (1931);

Elgin Natl. Watch Co. v. Barrett, 213 F. 2d 776, 779 (5th Cir., 1954);

Foltz v. St. Louis & S. F. Ry. Co., 60 Fed. 316 (8th Cir., 1894);

7 Moore's Federal Practice, Sec. 60.25, pp. 264-271.

⁶In 7 Moore's Federal Practice, Section 60.25, the author concludes (p. 272):

"Clause (4) does not, however, have wide applicability, because *under principles that are applicable in determining whether a judgment is valid or whether it is void, most federal district court judgments, even though they be erroneous, are not void.*" (Emphasis added.)

As the Supreme Court pointed out in *Stoll v. Gottlieb*, *supra*, at page 171:

“A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators. *There must be admitted, however, a power to interpret the language of the jurisdictional instrument and its application to an issue before the court.*” (Emphasis added.)

Section 340(a) of the Immigration and Nationality Act expressly conferred power upon the court below to revoke and set aside the order admitting appellant to citizenship and to cancel his certificate of naturalization; so that its action in entertaining appellee’s suit without the required affidavit constituted a mere error in the exercise of jurisdiction as distinguished from a usurpation of power.

Appellant raised the issue of jurisdiction in the denaturalization proceeding [R. 12, 14, 27] and it was decided adversely to him [R. 23]. He took an appeal to this Court [R. 32], but thereafter abandoned it [R. 33-34; see *Sunal v. Large*, 332 U. S. 174 (1947)]. The principle underlying the doctrine of *res judicata* was enunciated in *Baldwin v. Traveling Men’s Assn.*, 283 U. S. 522 (1931), where the Supreme Court declared (pp. 525-526):

“Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.”

The issue here involved was recently decided by Judge Wortendyke of the District of New Jersey in the case of *United States v. Bartolo Failla*, Civ. Action File No. 668-53 (July 18, 1958—opinion not yet reported).⁷ There the denaturalization judgment was entered on December 5, 1957, after the *Zucca* decision but before the Supreme Court's *per curiam* order of April 7, 1958 in the *Matles*, *Lucchese*, and *Costello* cases. On June 16, 1958 Failla moved to vacate and set aside the denaturalization judgment "because an affidavit showing good cause was not filed with the complaint,"⁸ invoking subdivisions (4) and (6) of Rule 60(b), Federal Rules of Civil Procedure. Judge Wortendyke in an exhaustive opinion denied the motion, holding that the denaturalization judgment was not void and that Failla had failed to show any basis warranting relief under Rule 60(b).

II.

The District Court Did Not Err in Denying Appellant Relief Under Rule 60(b)(5), Federal Rules of Civil Procedure.

In his Opening Brief appellant relies upon Rule 60(b)-(5), Federal Rules of Civil Procedure, which provides that on motion "and upon such terms as are just, the court may relieve a party" from a final judgment for the reason, *inter alia*, that "it is no longer equitable that the judgment should have prospective application." Appellant made no showing before the District Court, nor does

⁷This is the only decision appellee has been able to find involving the precise issue here involved.

⁸The *Failla* decision differs from the present case in that the affidavit was filed later during the denaturalization proceedings. Appellee does not believe this difference material.

he in his Opening Brief, to support his allegation that it is no longer equitable that the denaturalization judgment against him should have prospective application. Apparently he relies solely upon the decisions of the Supreme Court in the *Zucca*, *Matles*, *Lucchese*, and *Costello* cases, *supra*.

It is well settled, however, that Rule 60(b) was not intended to provide relief for error on the part of the court or to afford a substitute for appeal. *Ackermann v. United States*, 340 U. S. 193 (1950); *Morse-Starrett Products Co. v. Steccone*, 205 F. 2d 244, 248-249 (9th Cir., 1953); *Berryhill v. United States*, 199 F. 2d 217 (6th Cir., 1952); *United States v. Bartolo Failla*, Civil Action File No. 668-53 (D. C. N. J., July 18, 1958—Opinion not yet reported); *Loucke v. United States*, 21 F. R. D. 305 (S. D. N. Y., 1957). Nor is a change in the judicial view of applicable law after a final judgment sufficient basis for vacating such judgment entered before announcement of the change.⁹ (*Collins v. City of Wichita, Kansas*, 254 F. 2d 837 (10th Cir., 1958); *Berryhill v. United States*, *supra*; *United States v. Bartolo Failla*, *supra*; *Loucke v. United States*, *supra*.)

In *Ackermann v. United States*, *supra*, the Supreme Court considered a motion to set aside a denaturalization judgment. Although in that case petitioner urged the applicability of subdivision (6) of Rule 60(b) rather than subdivision (5) as is here contended, the case is persuasive as to the showing which the Supreme Court will re-

⁹At the time the denaturalization judgment was entered on July 12, 1955, the controlling precedent in this Circuit was *Schweinn v. United States*, 112 F. 2d 74, 75-76 (C. C. A. 9, 1940), affirmed 311 U. S. 616, which held that the affidavit requirement was not jurisdictional.

quire to set aside denaturalization judgments. The Supreme Court limited the applicability of Rule 60(b)(6) to "extraordinary circumstances" (340 U. S. at p. 199), as exemplified in *Klapprott v. United States*, 335 U. S. 601 (1949). Ackermann had alleged that he did not appeal the denaturalization judgment against him because his attorney advised him that he would have to sell his home to pay costs; and that a federal officer, in whose custody he and his wife then were and in whom he had confidence, had told him "to hang on to their home" and he would be released at the end of the war. With respect to these allegations, Justice Minton, speaking for the majority, declared (p. 198):

"* * * Petitioner made a considered choice not to appeal, apparently because he did not feel that an appeal would prove to be worth what he thought was a required sacrifice of his home. His choice was a risk, but calculated and deliberate and such as follows a free choice. *Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong*, considering the outcome of the Keilbar case.¹⁰ There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from."

In the case at bar appellant took an appeal, but allowed his appeal to be dismissed for want of prosecution. Appellant made no showing before the District Court as to the reason he failed to prosecute his appeal. Paraphrasing the language of the Supreme Court quoted above, appel-

¹⁰Keilbar was a relative of Ackermann against whom a denaturalization judgment had been entered in a consolidated trial with the Ackermanns. Upon appeal the judgment against Keilbar was reversed upon stipulation.

lant should not be relieved of his choice not to appeal because hindsight seems to indicate to him that his decision not to appeal was probably wrong, considering the outcome of the *Zucca*, *Matles*, *Lucchese*, and *Costello* decisions.

Moreover, a motion to vacate under Rule 60(b), Federal Rules of Civil Procedure, is addressed to the sound legal discretion of the District Court, and will not be disturbed on appeal except for abuse of discretion. (*Atchison, Topeka and Santa Fe Railway Co. v. Barrett*, 246 F. 2d 846, 849 (9th Cir., 1957); *Parker v. Checker Taxi Company*, 238 F. 2d 241, 243-244 (7th Cir., 1956), cert. den. sub. nom.; *Field Enterprises, Inc. v. Parker, et al.*, 353 U. S. 922; *Stafford v. Russel*, 220 F. 2d 853 (9th Cir., 1955); *Jones v. Jones*, 217 F. 2d 239, 241 (7th Cir., 1954); *Perrin v. Aluminum Co. of America*, 197 F. 2d 254, 255 (9th Cir., 1952); *Independence Lead Mines Co. v. Kingsbury*, 175 F. 2d 983, 988 (9th Cir., 1949).) The circumstances of the case at bar render the language of this Court in *Perrin v. Aluminum Co. of America*, *supra*, particularly applicable (p. 255):

"We are not prepared to say that the court abused its discretion in any particular. On the contrary we think its discretion was rightly exercised. Rule 60(b) was not intended to be resorted to as an alternative to review by appeal, *nor as a means of enlarging by indirection the time for appeal* except in compelling circumstances where justice requires that course. Cf. *Hill v. Hawes*, 320 U. S. 520, 64 S. Ct. 334, 88 L. Ed. 283. *Appellants had opportunity to obtain appellate review of the very rulings of which they now complain* but failed to take advantage of the opportunity within the time prescribed by Rule 73(a). *Having in consequence of their own lack of diligence*

been turned away at the front door they now seek at the rear. Certainly Rule 60(b) was not designed to afford machinery whereby an aggrieved party may circumvent the policy evidenced by the rule limiting the time for appeal. * * *” (Emphasis added.)

Conclusion.

Wherefore, for the reasons set forth above, it is respectfully submitted that the order of the District Court [R. 43] should be affirmed.

Respectfully submitted,

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See: Vol. 3078

No. 16,082

IN THE
United States Court of Appeals
For the Ninth Circuit

KENNETH WALKER and JOSEPHINE WALKER,	} <i>Appellants,</i>
VS.	
FAIRBANKS INVESTMENT COMPANY,	
	<i>Appellee.</i>

**On Appeal from the District Court of the United States
for the State of Alaska, Fourth Division.**

BRIEF FOR APPELLEE.

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Fairbanks, Alaska,
Attorney for Appellee.

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No. 16,082

IN THE

**United States Court of Appeals
For the Ninth Circuit**

KENNETH WALKER and JOSEPHINE
WALKER,

Appellants,

vs.

FAIRBANKS INVESTMENT COMPANY,

Appellee.

On Appeal from the District Court of the United States
for the State of Alaska, Fourth Division.

BRIEF FOR APPELLEE.

NATURE OF CASE.

Plaintiffs were seeking in the District Court to divest the interest of defendants, Chester W. Jackson and Martha L. Jackson, purchasers under a real estate contract, and the interest of defendant, Fairbanks Investment Company, assignee of James B. and Mary Fern Ing, sellers under said contract. Plaintiffs claimed that they had a judgment lien against all of James B. Ing's interest in the real property covered by said contract, and that the conveyances of said interests were not effective as against the plaintiffs'

judgment lien, since said conveyances were not recorded at the date of the entry of said judgment against James B. Ing. The plaintiffs appeal from decision granting the Jacksons' motion for summary judgment, and Fairbanks Investment Company's motion to dismiss this cause.

PLEADINGS.

Since the decision of the trial court was based on motions for summary judgment and to dismiss, it is necessary to examine the pleadings filed.

Complaint.

On January 9, 1958, a complaint in the above entitled cause was filed against said Jacksons, Fairbanks Investment Company, and James B. Ing and his wife. (Transcript 1-8, hereafter called Tr.) The complaint, among other things, alleged that on October 25, 1957, in a separate action numbered 7807, filed by the appellants against James B. Ing, the District Court announced in open court a finding in favor of said appellants and an award of a judgment in the sum of \$20,000.00. Their request for an additional \$24,226.43 in special damages was withheld until submission of briefs. On November 9, 1957, there was a finding that appellants were entitled to said special damages, and judgment was entered and docketed against James B. Ing, in the total sum of \$44,226.43. On November 29, 1957, the court amended said judgment to reduce the

amount to \$37,673.10. Executions had been issued on November 20, 1957, against Ings' property and were returned unsatisfied. James B. Ing and his wife, on November 4, 1957, for the sum of \$5,000.00, had assigned to the appellee all their interest, by instrument dated November 4, 1957, to the real estate contract dated October 31, 1956, existing between the Ings, as sellers, and the Jacksons, as purchasers, which contract was the subject of an escrow in the Alaska National Bank of Fairbanks. In addition, the assignors had executed a quit-claim deed conveying their interest to the property covered by said contract and assignment "for use in the event of breach or default on the part of said purchasers". This assignment was recorded on December 18, 1957. The appellants alleged that it was void as against their judgment lien by virtue of *ACLA, 1949*, as amended, 55-9-63. Said real estate contract between the Ings and the Jacksons was executed on October 31, 1956, and recorded December 20, 1957, and appellants alleged that under said statute it was void as against their judgment lien.

Plaintiffs' motion for summary judgment.

On February 21, 1958, plaintiffs filed a motion for summary judgment *only against Fairbanks Investment Company*, (Tr. 9) together with affidavit by their attorney, Mr. Merdes (Tr. 10-13).

Motion to dismiss by defendants Ing.

On March 5, 1958, defendants James B. Ing and Mary Fern Ing filed a motion to dismiss.

Motion to dismiss or in alternative for summary judgment by other defendants.

On March 31, 1958, said Chester W. and Martha L. Jackson, and Fairbanks Investment Company, filed their motion to dismiss this cause, because the complaint failed to state a claim against said defendants upon which relief can be granted, or in the alternative, for a summary judgment on the ground that there was no genuine issue as to any material fact, and that said defendants were entitled to judgment as a matter of fact. (Tr. 14)

In support of said motions and in opposition to plaintiffs' motion for summary judgment, said defendants had filed affidavits of Chester W. Jackson (see Tr. 46), and the following officers and directors of said Fairbanks Investment Company: Wilbur Walker, president; Wallace Cathcart; Louis Krize, secretary; and Edward F. Stroecker, treasurer. (Tr. 15-18.)

STATEMENT OF FACTS.

The following is a brief summary of the facts predicated on the pleadings and the affidavits, which were uncontroverted at the time of the hearing on the motions:

Ing's title.

On October 23, 1953, defendant, James B. Ing, became vested with fee simple title to Lot (4), Block (52) of the Townsite of Fairbanks, by virtue of deed

executed on that date. Said deed was recorded on October 28, 1953. (Tr. 4)

Sale to Jacksons.

On October 31, 1956, James B. Ing and Mary Fern Ing entered into a written real estate contract, as sellers, with Chester W. Jackson and Martha L. Jackson, buyers, for sale of said property. (Tr. 11, 32-38) The balance of the purchase price was payable monthly in installments of \$250.00, to be paid to Alaska National Bank of Fairbanks, escrow agent, and by the latter applied to discharge payments due under a prior mortgage, and in reduction of sellers' equity. The Jacksons have had possession of said property since approximately November 1, 1956. (See Tr. 46.) They now occupy it, and have been making monthly payments under said contract on the balance of the purchase price remaining due.

Assignment by Ings.

On November 4, 1957, said James B. Ing and Mary Fern Ing, sold and assigned, in writing, all their right, title and interest as sellers under said real estate contract, and all the proceeds (balance of \$6,905.23) (Tr. 7), and benefits thereunder, to Fairbanks Investment Company, a corporation, for a consideration of \$5,000.00, paid on that date by said corporation to James B. Ing and Mary Fern Ing. Reference was made in said assignment to said contract as being the subject of an escrow at Alaska National Bank of Fairbanks. In addition, they executed and delivered a quit-claim deed to said corpo-

ration, "for use in event of breach or default on the part of said purchasers". (Tr. 15, 16) This transaction was open and public, and not secret, since assignee desired payments under contract to come to it, through said escrow agent.

Fairbanks Investment Company.

The following persons constitute the Board of Directors of said corporate defendant: Phil Anderson, Wallace Cathcart, Jr., Joe Franich, Lloyd Burgess, Louis E. Krize (secretary), Robert B. Hoitt, Edward F. Stroecker (treasurer), Wilbur Walker (president), Lee Linck, and Walter Sczudlo (vice president and counsel for said company on this appeal). The company is in the business of buying and selling investments in both real properties, and in contracts and negotiable instruments. Under said assignment of all interest of the Ings as sellers, under said contract, said corporate assignee became entitled to all the proceeds under the contract payable to the sellers under this contract, more specifically the monthly payments, a personal property interest. The buyers under said contract were entitled to continue in possession of the property in question, and did continue in possession. (Tr. 15-16)

Plaintiffs' judgment.

On November 9, 1957, plaintiffs obtained the entry of judgment against James B. Ing in Civil Cause No. 7807, *Walker, et al. vs. Ing*, arising out of a claimed breach of contract involving sale of the Shamrock Bar

and skating rink by the Walkers to Ing. (Tr. 10) It was amended on November 29, 1957. (Tr. 2)

Defendants purchasers in good faith for value and no intent to defraud.

At no time before entry of said judgment against James B. Ing did defendants Chester W. Jackson, Martha L. Jackson, or Fairbanks Investment Company, a corporation, have knowledge of proceedings in Cause No. 7807, or that a judgment was imminent in that cause. In all their transactions with James B. Ing and Mary Fern Ing with respect to said property and contract of sale and assignment, said defendants acted as purchasers in good faith for value, and acted without any intent to hinder or defraud creditors of James B. Ing, or any other party. (Tr. 16, and 46.)

SUMMARY OF ARGUMENT.

Statement of Law.

- I. The assignment of Mr. and Mrs. Ings' interest, as vendors under the Jackson contract, to appellee, although unrecorded on November 9, 1957, the date of entry of the Walker judgment, is not void against the lien of said judgment under *ACLA 1949*, 55-9-63, because the open possession of land by the vendees under the contract of said owners to sell and convey it to them upon the payment of the purchase price in monthly installments, described in the con-

tract, is notice to creditors of the vendors, of the contract terms, and of any unrecorded assignment of the proceeds of such monthly payments made before the entry of the judgment or other grant of credits.

1. Admission of appellants.
2. Statutes regarding extent of judgment lien.
3. Leading case.
4. Meaning of word "void".
 - (a) Oregon statute.
 - (b) Interpretation and construction of Oregon statute.
5. General law on possession of property as giving actual notice.
6. General law on actual notice.
7. Uniform recording plan in Alaska.
8. Factors throwing light on legislative intent.
 - (a) A judgment lien has no superior dignity to that of other liens.
 - (b) The general law applicable to recordation of judgment liens applies in Alaska.
 - (c) There is no indication that the Alaska legislature intended by *ACLA 1949, 55-9-63*, to depart from the purpose of its general recording plan.
 - (d) Appellants' proposed construction of the Alaska statute would obviously lead

to an inequitable result, and many clouds on title.

- II. The interest of the vendor or his assignee under an executory land contract is personal property, and therefore, is not covered by judgment lien statute.
- III. Judgment lien statute does not contemplate recordation of executory contracts for sale of land.
- IV. Appellants' position is not supported by their authorities.

STATEMENT OF LAW.

- I. THE ASSIGNMENT OF MR. AND MRS. ING'S INTEREST, AS VENDORS UNDER THE JACKSON CONTRACT, TO APPELLEE, ALTHOUGH UNRECORDED ON NOVEMBER 9, 1957, THE DATE OF ENTRY OF THE WALKER JUDGMENT, IS NOT VOID AGAINST THE LIEN OF SAID JUDGMENT UNDER ACLA, 1949, 55-9-63, BECAUSE THE OPEN POSSESSION OF LAND BY THE VENDEES UNDER THE CONTRACT OF SAID OWNERS TO SELL AND CONVEY IT TO THEM UPON THE PAYMENT OF THE PURCHASE PRICE IN MONTHLY INSTALLMENTS, DESCRIBED IN THE CONTRACT, IS NOTICE TO CREDITORS OF THE VENDORS, OF THE CONTRACT TERMS, AND OF ANY UNRECORDED ASSIGNMENT OF THE PROCEEDS OF SUCH MONTHLY PAYMENTS MADE, BEFORE THE ENTRY OF THE JUDGMENT OR OTHER GRANT OF CREDITS.

1. Admission of appellants.

Although denied and heatedly contested in the trial court, the appellants have now conceded (their brief, p. 7) that Mr. and Mrs. Jackson's interest, as vendees under a contract of purchase with the Ings, is not

void under the statute above cited, and as alleged in their complaint, under the principle "which holds that possession of the premises by vendee under a contract of sale constitutes constructive notice of the vendee's interest in the property to third persons, including judgment creditors of the vendor".

The principle in question, and formulated generally by the courts, is to the effect that possession of real property is a fact putting all persons on inquiry as to the nature of the occupant's claim, *as well as the claim of the person under whom he occupies*. (87 ALR, 1530-1540, and numerous cases cited, including the *Lynch* case, hereinafter mentioned.)

2. Statutes regarding extent of judgment lien.

The two statutes involved in this case regarding judgment liens are § 55-9-61, *ACLA*, 1949, as amended by Chapter 52, SLA 1955, and § 55-9-63, *ACLA*, 1949.

The pertinent portion of the former statute is as follows:

"... from the date of docketing a judgment in the judgment docket of the District Court, such judgment shall become a lien upon all the real property of the defendant within the recording district wherein the District Court maintains such judgment docket, and upon all the real property which the defendant may afterwards acquire therein, during the time an execution may issue thereon. . . ."

§ 55-9-63, *ACLA* 1949, reads as follows:

"*When conveyance void against lien.* A conveyance of real property or any portion thereof

or interest therein shall be void against the lien of a judgment unless such conveyance be recorded at the time of docketing such judgment or the transcript thereof, as the case may be.”

3. Leading case.

The leading case on the issues involved herein is *Frank Lynch Co. v. National City Bank of Chicago*, 1919, 261 F. 480.

Facts of the case. The Northern Trading Company made a contract with Arno Kresse to sell and convey to him certain real estate, free from any encumbrances, upon his payment of six promissory notes given for a part of the purchase price, maturing at various dates between November 1, 1913, the date of the contract, and October 21, 1921. Kresse immediately took possession, and continued in possession of the land. There were two recorded mortgages, which covered the land in question, and other lands. On January 21, 1916, there was owing by Kresse on his notes and contract, approximately \$4,655.00 and some interest. There were also principal balances due on the first and second mortgages. On that day, for a valuable consideration, the Trading Company indorsed Kresse's notes, and sold and delivered them, together with a written assignment of them, and of the contract, and the title, both to the land in question and to other land, to Frank Lynch Company, and delivered to it a deed thereof. On the following day, January 22, 1916, before the assignment of the contract or the deed were recorded, the National City Bank of Chicago recovered and docketed a judgment for \$15,711.50

against the Trading Company, in whose name the title to the land in question, subject to the two mortgages, appeared of record at that time.

Both the Bank and Lynch Company claimed that they were entitled to payment of the amount Kresse still owed for the purchase of the land in question, and he brought this action against each of them and against the respective holders of the two prior mortgages, offering to pay the amount he still owed on his notes, and prayed that the validity and priority of the liens on the land in question be adjudged.

North Dakota statute applied. The recording acts of North Dakota in effect at that time provided as follows:

“ . . . every conveyance by deed, mortgage or otherwise, of real estate within this state, shall be recorded in the office of the register of deeds of the county where such real estate is situated, and every such conveyance not so recorded shall be void * * * as against any attachment levied thereon or any judgment lawfully obtained, at the suit of any party, against the person in whose name the title to such land appears of record, prior to the recording of such conveyance, (*Compiled Laws of North Dakota, 1913, §5594*); that the term “conveyance”, as used in the last section, embraces every instrument in writing by which any estate or interest in real property is created, * * * or by which the title to any real property may be affected, except wills and powers of attorney” (section 5595); and that “every instrument, except a will in execution of a power, even though the power is one of revocation only,

is to be deemed a conveyance within the meaning of the chapter on recording transfers' (section 5413)."

Law applied to facts of case. The court held, in effect, with respect to the rights of assignee of vendor's rights in land contract against vendor's judgment creditor, as follows:

That "the possession of one who entered on land under a contract for the purchase thereof on installments is not only notice to the whole world of his rights, though the contract was not recorded as authorized by Comp. Laws N.D. 1913, §5594, but is notice that notes given for deferred purchase money may be negotiated, and where such notes were negotiated for a valuable consideration and the contract assigned, the assignee takes priority of one who recovered judgment against the original vendor before the assignment of the contract, etc., was recorded."

The court further stated, with respect to the statute above cited, that:

"But there is an implied general exception to the broad statement of recording statutes that unrecorded deeds and assignments of interests in real estate shall be void, to the effect that such grantees named therein and such judgment creditors as have actual or constructive notice of such unrecorded deeds or assignments are not protected by the recording statutes. *A contract by the owner of land to convey it to a grantee upon the future payment of installments of the purchase price, followed by the immediate possession of the land thereunder by the vendee, falls within*

this exception, although such a contract falls clearly far within the terms of the recording statutes. It is an 'instrument in writing * * * by which the title to any real estate may be affected'. Counsel for the bank concede that it is unnecessary to record such a contract and that such a contract supported by the possession of the vendee thereunder is not void as against a judgment creditor of the vendor notwithstanding the clear declaration of the statutes that every such conveyance is void. And why is it not void? *Because the open possession of the land by the vendee is notice to all the world of the title and of the contract under which he claims, and of all the terms thereof*, and because, when a vendor makes such a contract, he holds the legal title in trust for his cestui que trust, his vendee. The subsequent judgment creditor, the bank, therefore, had notice by the possession of Kresse when it docketed its judgment that the Trading Company's title to the southeast quarter was subject to Kresse's contract and his right thereunder, that Kresse had given his negotiable promissory notes for the unpaid purchase price, that they were negotiable, and that they might have been discounted or sold, or assigned to some third person." (Italics added.)

"* * * The open possession of land by a vendee under the contract of the owner to sell and convey it to him upon the payment of the part of the purchase price thereof evidenced by his negotiable notes described in the contract is notice to grantees, mortgagees, and judgment creditors of the vendor of the contract, of its terms, and of any unrecorded transfer by the vendor of the

vendee's notes to a third person made before the vendor made his grants or mortgage of the land, or before the judgment against him was docketed, and the transferee of the notes has, notwithstanding the recording statutes, the superior right to the payment of the notes to himself. The Trading Company in this case for value endorsed, sold, delivered, and assigned the promissory notes of Kresse to the Lynch Company before the judgment of the bank was docketed. The open possession of the land by Kresse under his contract or purchase was notice to the bank of that contract and of this sale and transfer when its judgment was docketed, although the assignment and deed accompanying the transfer were not recorded and the right of the Lynch Company to the notes, to the payments thereof to it, and to the fund derived from their payment, was under this settled rule of law on this subject in North Dakota superior to the right of the bank thereto and superior to the lien of its judgment either on the fund or on the land. The bank's judgment lien was subject to the liens of the two mortgages on the two quarter sections and to the right of the Lynch Company to the payment to it out of the southeast quarter section of the unpaid notes of Kresse, and to the fund such payments should produce."

Cases cited in Lynch decision. Two cases are cited in the *Lynch* decision, which are particularly relevant to the instant case:

Curtis v. Moore, 1897, 152 N.Y. 159, 163, 46 N.E. 168, 57 Am. St. Rep. 506, concerned an unrecorded as-

signment of a mortgagee's interest. The facts of that case are as follows: The mortgagee assigned his interest as mortgagee to an assignee. The assignee failed to record his interest. Later, the mortgagor conveyed his interest to the mortgaged premises to the mortgagee. The mortgagee then apparently held himself out to a Mr. Moore as the owner of the property in fee simple. Mr. Moore apparently assumed that the former mortgagee had good title to the land, and proceeded to purchase the property from the former mortgagee. Mr. Moore recorded his title to the property before the assignee recorded his assignment. The issue, of course, is the effect of the failure of the assignee of the mortgage to record his interest. The answer given by the court is as follows:

“Mr. Moore was not a bona fide purchaser, within the principle established by those authorities, because the record of the mortgage was notice to him that the mortgage was outstanding and unsatisfied, and it was no concern of his who happened to be the owner at the time. In dealing with the property on the assumption that Edward S. Curtis (mortgagee) still owned the mortgage, he acted at his peril, and assumed the risk that Curtis might have transferred the mortgage to someone else.”

By liberal use of paraphrasing, defendant will show that the fact situation in the *Curtis* case is quite similar to that in this case.

The Walkers were put on notice that the property once owned by James B. Ing was encumbered or possessed by a third party. They were put on such

notice because of the occupation of said property by the Jacksons. Jacksons' occupancy was notice to the Walkers that either the Jacksons had title to the property in fee simple, or that an executory land contract was outstanding and unsatisfied. In dealing with the property on the assumption that James B. Ing still owned an interest as vendor under said contract, the Walkers acted at their peril, and assumed the risk that James B. Ing might have transferred the contract to someone else.

The court, in the *Lynch* case, also discussed *Quaschneck v. Blodgett*, 32 N.D. 603, 612, 156 N.W. 216, 218. The following is quoted from page 484 of the *Lynch* decision:

“Hall was the owner of the land and Quaschneck was his vendee in possession, under Hall's unrecorded contract to convey, in which the deferred payments of the purchase price were evidenced by the vendee's negotiable notes payable to Hall. One of Quaschneck's notes was for \$3,700.00, and Hall assigned it to the Amboy Bank as collateral security for his debt to that bank. Afterwards Hall mortgaged the land to Caldwell, and Caldwell assigned the mortgage for value to Blodgett. The mortgage was recorded October 12, 1908, and the assignment was recorded December 5, 1908. Blodgett took the mortgage for value, in good faith, in reliance on the record title, and the question was whether the Bank of Amboy or Blodgett had the better right to the moneys owing by Quaschneck on his note held by the bank. The Supreme Court of North Dakota held: (1) That Quaschneck's contract for a deed was subject to the recording acts; that the recording acts were in-

applicable to that cause, because Quaschneck's open possession of the land under a contract gave notice to all the world of his rights; and (2) that that possession also gave notice to the mortgagee in, and to the assignee of, the mortgage, not only of Quaschneck's note to the Bank of Amboy, and of that bank's rights, and that the bank's right to the payment of Quaschneck's note pledged to it was superior in law and in equity to the claim thereto of Hall's mortgagee, or of that mortgagee's assignee."

Principle underlying Lynch, Curtis and Quaschneck cases. The principle underlying these cases is simple. Once a potential vendee (or judgment creditor) has notice of the existence of a possible executory land contract, he is also simultaneously put on notice that the vendor may have alienated his interest under such an executory land contract. This is a particularly reasonable inference, since the vendor's or mortgagee's interest is frequently reflected by a promissory note. Promissory notes generally are negotiable and assignable. Even if the vendor's or mortgagee's interest is not reflected by such a note, anyone dealing with such a party should know that such interests easily lend themselves to transfers and assignments. A reasonably prudent man would contemplate the likelihood of such a transfer, when he deals with a vendor or mortgagor and would make full inquiries before proceeding in transactions with a vendor or mortgagee. He would not rely on record title alone. The interests of a vendor under a contract are considered by many financial institutions as analogous to a mortgagee's interest.

4. Meaning of word "void".

The major issue in this case concerns the proper construction of the word "void", under said statute, *ACLA* 1949, 55-9-63. The issue is, "void against whom?". Fortunately, the answer is clear. It means: Void against judgment creditors, who acquired such judgment lien in good faith without knowledge or notice, actual or constructive, of such prior unrecorded conveyance of *real property*, or assignment of proceeds under an executory contract of sale.

(a) Oregon statute.

The Alaska statute is drawn directly from §18,370 of the Oregon Revised Statutes (formerly designated as 1862; D268; H271; BC207; LOL207; OL207; OC2-1603; OCLA6-803). That statute reads as follows:

"When conveyance void against lien. A conveyance of real property or any portion thereof or interest therein shall be void against the lien of a judgment unless such conveyance be recorded at the time of docketing such judgment or the transcript thereof, as the case may be."

(b) Interpretation and construction of Oregon statute.

United States v. Griswold, (Ore. 1881), 8 F. 572, well states the rule with respect to the proper construction to be given to the statute.

"In equity, a judgment creditor has not been regarded as a purchaser in the sense of the rule which prefers the right of a bona fide purchaser for a valuable consideration to a prior title under an unregistered deed. Story, Eq. Jur., §§1502, 1503a."

“The fact that the conveyance of a subsequent purchaser, though first recorded, is not allowed by the analogous section 268 aforesaid to prevail over that of a prior purchaser, unless obtained in good faith, is a good reason why a court of equity, in administering and construing said section 268, should presume that the legislature, in enacting it, did not intend to make a conveyance void as against a subsequent judgment lien, unless the latter was acquired in good faith”.

The following annotations to §18,370 of Oregon Revised Statutes make it abundantly clear that there is only one proper interpretation of the statute. Thus:

“The intention of the legislature was to give a creditor under an attachment, judgment or execution the same standing in regard to his right in or to the property which he would gain by a purchase of the property from the debtor.” *Riddle v. Miller*, (1890) 19 Or. 468, 23 P. 807.

“The lien of a judgment will not prevail over a prior unrecorded conveyance unless it also appears that the lien was taken or acquired in good faith without knowledge or notice of such prior unrecorded conveyance.” *Baker v. Woodward*, (1884) 12 Or. 3, 6 P. 173; *Laurent v. Lanning*, (1897) 32 Or. 11, 51 P. 80; *Crossen v. Oliver*, (1900) 37 Or. 514, 61 P. 885; *Western Savings Co. v. Currey*, (1900) 39 Or. 407, 65 P. 360, 87 Am. St. Rep. 660; *Belcher v. LaGrande Nat. Bank*, (1918) 87 Or. 665, 171 P. 410; *Thompson v. Hendricks*, (1926) 118 Or. 39, 245 P. 724; *United States v. Griswold*, (1881) 8 Fed 556, 571.

“A judgment creditor who is informed of an outstanding equity or of facts sufficient to put him

on inquiry at the time his lien attached takes subject thereto." *Stannis v. Nicholson*, (1868) 2 Or. 332; *Riddle v. Miller*, (1890) 19 Or. 468, 23 P. 807.

"Possession of a purchaser under unrecorded deed charges the judgment creditor with notice of the grantee's rights, though the premises were in possession of the same persons before and after conveyance." *Belcher v. LaGrande Nat. Bank*, (1918) 87 Or. 665, 171 P. 410.

5. **General law on possession of property as giving actual notice.**

"Possession of land is notice to the world of every right that the possessor has therein, legal or equitable; it is a fact putting on inquiry as to the nature of the occupant's claims as well as the person under whom he claims." *American Jurisprudence, Notice and Notices*, § 18, *Possession of Land*.

"Possession of land is a fact putting all persons on inquiry as to the nature of the claim of the occupant and of the person under whom he occupies . . ." *American Jurisprudence, Vendor and Purchaser*, § 712, *Possession and Use of Property*.

In the instant case, plaintiff had been put on inquiry as to the interests of the Jacksons, as purchasers of land, who were in possession, open and notorious, since approximately November 1, 1956, and of the interest of Fairbanks Investment Company, Inc., the party under whom they occupy the premises. There was no proof or facts shown, or alleged, in appellants' complaint or affidavits that any inquiry was made by

them of the Jacksons as to the nature of their claim and of the person under whom they occupied. There was nothing shown by the appellants that such inquiry would not have disclosed that payments were being made to the escrow agent and by the latter to the prior mortgage holder, and to the assignee of the vendors.

6. General law on actual notice.

“It is an elementary rule in the construction of recording laws that notice of an unrecorded instrument is equivalent to recording of it, with respect to the person having such notice. As a general rule, an unrecorded deed or other instrument affecting the title to land is valid, therefore, against a subsequent purchaser taking with knowledge or notice of the existence of the instrument; and while this exception is usually the result of construction, yet is sometimes expressly declared by the statute.” *American Jurisprudence, Records and Recording Laws*, § 172, *Effect of notice other than record*.

7. Uniform recording plan in Alaska.

The general recording statute in Alaska is § 22-3-25, *ACLA 1949*, as amended by Ch. 9, *SLA 1955*, which reads as follows:

“Every conveyance of real property within the Territory of Alaska hereafter made, other than a lease for a term not exceeding one year, shall be void as against any subsequent innocent purchaser or mortgagee in good faith and for a valuable consideration of the same real property or any portion thereof, whose conveyance shall be

first duly recorded. An unrecorded instrument is valid as between the parties thereto and those who have actual notice of it."

This is the type of recording statute common throughout the United States. It gives potential vendees and transferees full protection from fraudulent conveyances. That is the only purpose of the statute and the purpose is fully achieved. §22-4-3, *ACLA 1949*, relates directly to fraudulent conveyances. It, too, is consistent with §22-3-25, *ACLA 1949*, and is completely inconsistent with appellants' proposed construction of the judgment lien statutes. It provides as follows:

"Purchasers with notice. No such conveyance or charge shall be deemed fraudulent in favor of a subsequent purchaser who shall have actual or legal notice thereof at the time of his purchase, unless it shall appear that the grantee in such conveyance, or person to be benefited by such charge, was privy to the fraud intended."

Thus, it would appear that the Alaskan legislature intended to erect a uniform recording plan for the recordation of all interests subject to recordation, including judgment liens. It also appears that the legislature intended the same consequences upon failure to record should be borne in equal degree by any holders of unrecorded interests, without particular discrimination against any one class of such holders. In short, the term "purchasers or lienors" *without notice* is a common denominator of all the Alaska

statutes regarding recordation, whether this is spelled out in the statutes in that particular manner or not.

8. Factors throwing light on legislative intent.

There is no indication that the legislature intended to depart from the general rules applicable to judgment lien statutes. In support of appellants' construction of the judgment lien statute, appellants are compelled to urge that the Alaska legislature intended one or more of the following:

(a) That a judgment lien should be given some superior dignity to all other liens.

(b) That Alaska should have a set of recording laws entirely inconsistent or in conflict with each other, and with recording laws as they exist in the various states of the union.

(c) That the legislature intended that holders of interests in property potentially subject to judgment liens against prior owners could be suddenly and inequitably divested of their interests by judgment creditors of such prior owners, with notice.

(d) That it was intended to subject unrecorded interests in land to many potential clouds on their title.

The following should be noted briefly with reference to each of these points:

(a) A judgment lien has no superior dignity to that of other liens.

“A judgment lien does not prevail as against other interests upon the ground that it is of superior dignity. To the contrary, the general rule is that the lien of a judgment is subject to interests

previously acquired.” *Bowling v. Garrett*, 49 Kan. 504, 31 P. 135, 33 Am. St. Rep. 377. See also *American Jurisprudence, Judgments*, §343, p. 38.

- (b) The general law applicable to recordation of judgment liens applies in Alaska.

These general rules are as follows:

“Again, the general rule is that a judgment creditor having at the time judgment is entered notice of an unrecorded deed or mortgage already executed by the judgment debtor will take subject thereto.” 185 U.S. 505, 4 ALR 442. See also *American Jurisprudence, Records and Recording Laws*, §§ 153, 154, 167.

“The general rule that constructive notice of an outstanding interest in land may be predicated upon possession of the property has been applied as against judgment creditors.” *American Jurisprudence, Judgments*, § 362, p. 48. See also: *Groff v. State Bank*, 50 Minn. 234, 52 N.W. 651; *Allen-West Commission Co. v. Millstead*, 92 Miss. 837, 40 So. 256; *Butcher v. Kagey Lumber Co.*, (Ohio) 128 N.E. 2d 54.

It must be assumed that the Alaska legislature did not intend by *ACLA 1949, 55-9-63*, pertaining only to judgment liens, to create a recordation statute that is completely inconsistent with other Alaska recording statutes. (See pars. 1 and 7, *supra*.)

- (c) There is no indication that the Alaska legislature intended by *ACLA 1949, 55-9-63*, to depart from the purpose of its general recording plan.

The evident purpose, indeed the only conceivable purpose, in enacting recording statutes is to protect

purchasers or encumbrancers of property against fraudulent conveyances.

The Alaska statutes, 22-4-1, et seq., accordingly provide for protection of innocent purchasers against fraudulent conveyances. 22-4-3 expressly limits the protection of these statutes to those purchasers who do not have actual or legal notice of the fraudulent nature of the purchase. (See sec. I, pars. 1 and 7, supra.) 22-3-25 creates the general Alaska recording scheme whereby recordation would give constructive notice only to those individuals who are "innocent purchasers in good faith and for a valuable consideration."

If the legislature had intended to give judgment liens some special dignity, and make sec. 55-9-63 inconsistent with the general recording plan adopted in Alaska, it would seem that it would have used language, which would clearly indicate that intent. For example, the legislature could have provided that all unrecorded conveyances of real property shall be void against the lien of a judgment, except as between the parties thereto, whether the judgment lienor is with or without actual notice of such conveyance. It is obvious that the legislature would not desire a judgment lienor with notice to take against innocent purchasers, unless it clearly indicated a contrary intent.

(d) Appellants' proposed construction of the Alaska statute would obviously lead to an inequitable result, and many clouds on title.

Appellee believes that the inequity of appellants' proposed construction of the statute is too manifest to require discussion. Appellee would, however, like to point out that there is the following practical danger

in construing the statute as appellants' urge. Unscrupulous individuals could examine title records. Whenever a transfer in a real property interest could be found, which was not properly recorded, a suit could be trumped up against the former holder of the property or an assignment of a dubious cause of action against the former holder might be arranged. Suit could then be brought against the former holder. It is likely that a default judgment could be obtained against the former holder of the property, and thereby a lien could be obtained against the recorded interest in his property. The statute would then be an invitation to fraud.

There have been many judgments probably rendered in past years against individuals, who have conveyed their interest in real property before the date of a judgment against the conveyor. Such conveyances have not been recorded, since the conveyances were a matter of general knowledge, either by actual or constructive notice before the date of judgment. This would certainly be true in instances where the purchaser has moved on the property of the judgment debtor before the date of the judgment. The number of possible clouds on real properties in the State of Alaska would be greatly increased, if all unrecorded interests in real property were subjected to any judgment liens, which have come into existence against the conveyors after unrecorded conveyances and within the last ten (10) years.

II. THE INTEREST OF THE VENDOR OR HIS ASSIGNEE UNDER AN EXECUTORY LAND CONTRACT IS PERSONAL PROPERTY, AND THEREFORE, IS NOT COVERED BY JUDGMENT LIEN STATUTE.

§55-9-63, the judgment lien statute, applies only to, "A conveyance of real property or any portion thereof or interest therein . . ."

Under the doctrine of equitable conversion, the vendor's interest in a contract of purchase and sale of real property is converted into personal property upon execution of the contract. Thus, in *American Jurisprudence, Equitable Conversion*, §11, *Contract*, it states:

"Thus, an executory contract for the sale of land works a conversion, since equity regards 'things agreed to be done as actually performed', and treats the vendor as holding the land in trust for the purchaser and the purchaser as a trustee of the purchase price for the vendor. The vendee is, in the contemplation of equity, actually seized of the estate, . . . It is a well-established principle that, pending the completion of an enforceable executory contract for the sale of real estate, such real estate is regarded as converted into personalty from the time of the execution of the contract, notwithstanding the fact that an election to complete the purchase rests entirely with the purchaser."

Looking at this from a practical point of view, after the contract has been entered into, the primary intention of the vendor or the vendor's assignee is to receive periodical payments from the vendee. It is the contract right to receive such payments that the ven-

dor or his assignee is primarily interested in, and not the possibility of declaring the vendee in default and of eventually foreclosing.

Consequently, the interest of Fairbanks Investment Company is personalty, and is therefore outside the scope of the judgment lien statute, which applies to conveyances of real property.

III. JUDGMENT LIEN STATUTE DOES NOT CONTEMPLATE RECORDATION OF EXECUTORY CONTRACTS FOR SALE OF LAND.

It is clear that the recording statutes and judgment lien statutes contemplate that outright sales or transfers of real property shall be covered. However, many transactions, which might be deemed to affect real property interests, are not necessarily included.

Bamberger v. Geiser, (Or.) 33 P. 609, is a case which is useful in delineating the scope of Alaska recording statutes, since many of the Alaska recording statutes derive from Oregon. The general recording statute of Alaska, §22-3-25, *ACLA* 1949, before it was amended in 1955, read the same as the analogous Oregon statute:

“Invalidity of unrecorded conveyance against subsequent innocent purchaser. Every conveyance of real property within the Territory hereafter made which shall not be filed for record as provided in this chapter, shall be void against any subsequent innocent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded.”

The present wording of the above statute is given under sec. I, par. 7, *supra*.

In commenting on the effect of recording an assignment of a mortgage, and whether such recordation would give constructive notice or not, the Oregon court said at page 612 of the *Bamberger* case, quoting with approval from *Trust Co. v. Shaw*, 5 Sawy. 340:

“... An assignment of a mortgage may be made by an instrument in the form of a conveyance, and in such case may be admitted to record. But an assignment of a mortgage may be a mere writing under the hand of the assignor, declaring that he thereby assigns the mortgage to a person therein named. Such a writing is effectual to pass a lien of the mortgage, but it would not be entitled to record unless acknowledged and certified; ... In the absence, then, of any legislative direction to that effect, there does not seem to be any obligation resting upon an assignee to record his assignment to protect himself against any subsequent purchaser or mortgagee.”

The *Bamberger* case was cited with approval in *Fischer v. Woodruff*, Wash., 64 P. 923. There the court stated at page 924:

“As the purpose of these acts is to protect subsequent bona fide purchasers and incumbrancers against prior unrecorded liens and conveyances, their propriety and utility may be conceded; but registration of instruments affecting property rights and titles is purely the creation of the statute, and, unless the statute requires the assignee of a mortgage to record the assignment, he is not guilty of negligence in failing to do so . . . ”

The position of the assignee of a seller under a contract of purchase and sale is analogous to that of the assignee of the mortgagee referred to in the above cases. (Tr. 7-8.) Financial institutions often treat the interest of a vendor under an executory contract for sale of land and providing for monthly payments, or notes evidencing same, as in the nature of a mortgage.

In absence of any statutory direction requiring the assignee of a land vendor to record an assignment, he is not guilty of negligence in failing to do so, nor is he obligated to do so to protect himself against any subsequent purchaser of the vendor's interest in the contract. Again, there is no indication that the legislature intended to give a holder of a subsequent judgment lien any greater dignity, or rights, or protection.

There is an obvious distinction between the position of the vendee and his assignee, and that of the vendor and his assignee. When a vendee under an executory land contract, or his assignee, negotiates and bargains with respect to a certain piece of property, he bargains with intent to acquire ownership, possession, and control of real property. On the other hand, the vendor, or his assignee, bargains and negotiates with intent to relinquish title, possession, and control of real estate, and in its place to acquire personal property, ordinarily money or the right to receive money.

IV. APPELLANTS' POSITION IS NOT SUPPORTED BY THEIR AUTHORITIES.

The cases cited by the appellants fail to support the arguments they present. They do not apply to the facts presented in this cause.

Thus, in *Kooper v. Haas*, 164 N.E. 23 (p. 12 of the appellants' brief), there is an attempted dedication and an acceptance, both of which did not appear as a matter of record in the Torrens registrar's office. The following statement of the court at p. 26 of the opinion should be noted, however:

“* * * The lien of an ordinary judgment is general, and extends only to the property right which the owner owns in premises, subject to the equities in it at the date of judgment. It is limited to the actual interest of the judgment debtor. * * * Unless the judgment creditor is able to point to some statute specifically giving him a right to a greater interest than that which the judgment debtor actually owns, he is limited to that right. Section 30 of the Conveyance Act (Smith-Hurd Rev. At. 1927, c. 30, §29), provides that deeds, mortgages, and other instruments in writing, which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice. By this section a judgment creditor is entitled to priority over the holder of an unrecorded conveyance. Section 30, however, is intended to apply only to such equities arising against the interest of the judgment debtor as are to be evidenced by instruments required to be recorded. Since no particular form is necessary

for the establishment of a common-law dedication, such a dedication may arise through circumstances, at least some of which are not susceptible of record. * * *

In *Pennsylvania Range Boiler Co. v. City of Philadelphia*, 23 A 2nd 723, (appellants' brief, p. 13) there was involved an award in eminent domain, release of future damages, and claim by subsequent purchaser without actual notice thereof. At p. 725 the court stated:

“* * * Concerning what constitutes notice, it was said, in *Re Tabor Street* (No. 1), 26 Pa. Super. 167, 173: ‘* * * whatever puts a party upon inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty, as in the case of purchasers and creditors, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding * * *’ * * *”.

In *re Frayser's Estate*, 82 N.E. 2d 633 (appellants' brief, p. 14), there was a proceeding by an administrator with will annexed against decedents' heirs for authority to execute deed conveying land pursuant to an option agreement executed by decedent. At p. 638 the court observed:

“* * * A sale of lands is the actual transfer of the title from grantor to grantee by an *appropriate instrument of conveyance*. An agreement to sell lands is a contract to be performed in the future, and if fulfilled results in a sale. * * *” (Italics added.)

In this appeal the following facts are important to keep in mind:

(a) There was an open assignment by the vendors of an executory contract to the appellee. It was not a secret assignment, which was not disclosed by the assignor and the assignee, as was the case in *National Bank v. Chafee*, 73 N.W. 318 (appellants' brief, p. 17).

(b) The assignment in this appeal was of payments under an executory contract, which payments were made by the vendee to a bank, as escrow agent. (There was also a quit-claim deed.)

(c) The possession of the vendee was open and notorious, and admitted by the appellants.

(d) There was no effort by the judgment creditors, the appellants, to ascertain of the vendees in possession as to the nature of their claim, or the claim of the persons under whom they occupied.

The following cases on which appellants depend so much can readily be distinguished on the above facts, as well as on the law, as applied in the *Lynch* case above cited, and as applied in Oregon from where the Alaska statute was taken:

Damron v. Smith, 16 S.E. 807 (appellants' brief, p. 16), (the assignor remained in possession, and no payments were involved under the contract assigned.); *Huffaker v. First National Bank of Brigham City*, 173 P. 903, appellants' brief, p. 17, (no constructive notice could be given by a warranty deed in trust involved in this cause.); *Battersby v. Gillespie*, 220

N.W. 480, appellants' brief, p. 17, (the recording statute involved was different from that involved in Alaska, and apparently the parties to the cause failed to consider the claims of the vendor under which the parties in possession occupied.); *Salisbury v. LaFitte*, 141 P. 484, appellants' brief, p. 17, (this case involved an option from an owner to purchase real estate.); *Johnson v. Strong*, 20 NYS 392, appellants' brief, p. 17, (in this cause there was indication that the vendee had abandoned his contract.).

CONCLUSION.

For the various reasons above stated, it is respectfully submitted that the decision of the trial court should be affirmed.

Dated, Fairbanks, Alaska,
February 9, 1959.

WALTER SCZUDLO,
Attorney for Appellee.



No. 16083.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARIA DE LA LUX VIRTUETTE TORRES,

Appellant,

vs.

RICHARD C. HOY, Acting Director, Immigration and
Naturalization Service, Los Angeles, California,

Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
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PAUL P. O'BRIEN, CLERK

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No. 16083.

IN THE

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MARIA DE LA LUX VIRTUETTE TORRES,

Appellant,

vs.

RICHARD C. HOY, Acting Director, Immigration and
Naturalization Service, Los Angeles, California,

Appellee.

APPELLEE'S BRIEF.

Statement of Jurisdiction.

Appellant, plaintiff below, brought an action in the United States District Court for the Southern District of California, Central Division, seeking judicial review of the administrative deportation hearings culminating in an order that she be deported [R. 3-5].¹ Jurisdiction there was invoked pursuant to 28 U. S. C. 2201 and 5 U. S. C. 1009.

The Judgment of the District Court [R. 15-16], entered in favor of appellee, was a final decision; hence, the jurisdiction of this Court would be found in 28 U. S. C. Secs. 1291 and 1294(1).

¹"R." refers to the printed Transcript of Record.

Statement of the Case.

On September 19, 1949, appellant, an alien, was convicted, under the name of Manuela Aguirre Ramirez, in the United States District Court for violation of 8 U. S. C. 144 (1940 Ed.), *i.e.*, smuggling aliens. Following a suspended sentence, she was allowed to voluntarily depart the United States to Mexico October 9, 1959.

Following the deportation hearing of December 26, 1956, the Hearing Officer found as a fact that appellant had resided almost continuously in the United States from the years 1943 through 1950. Moreover, prior to November 1, 1950, she had sought entry into the United States but had been excluded therefrom.

On November 1, 1950, appellant, at Tijuana, Mexico, applied for an immigration visa to the United States. In this application appellant stated, among other things: (1) that she was not a person "previously deported, or ordered deported and permitted to leave the United States voluntarily under the order of deportation"; (2) that she had not "been arrested or indicted for or convicted of any offense"; (3) that she was not a person "previously excluded from the United States at a port of entry"; and (4) that she had resided at the following places since the age of 14 years: Tala, Jalisco, Mexico, 1932-1946; Tijuana, Mexico, 1946-1950.

Appellant obtained her visa on November 1, 1950, and since November 2, 1950, has resided in this country. Subsequently, on December 26, 1956, appellant was present, with counsel, at a deportation hearing. Following the hearing, the Special Inquiry Officer found that the above statements in appellant's visa application were false and, further, found her deportable under the provisions of 8 U. S. C. 1251(a)(1) (*i.e.*, an alien who obtained a visa

by willfully misrepresenting material facts, contrary to 8 U. S. C. 1182(a), and therefore excludable at entry). The resulting order of deportation was affirmed by the Board of Immigration Appeals on September 6, 1957, and appellant thereafter sought relief in the District Court. The District Court found from the administrative record before it that the order of deportation was justified.

Questions Presented.

Appellee can only guess what questions appellant intended to present to this Honorable Court for review, and therefore perhaps erroneously concludes that the following questions only are presented: (1) that the District Court's finding that the order of deportation is based on reasonable, substantial and probative evidence is incorrect; and (2) that the District Court's finding that appellant's false statements were material is incorrect.

Appellee for its part raises these questions on this appeal: (1) whether or not the instant appeal should be dismissed for failure to observe this Honorable Court's rules; and (2) whether or not the instant appeal should be dismissed as frivolous and vexatious.

Statutes Involved.

Section 241(a)(1) of the Immigration and Nationality Act of 1952 [8 U. S. C. 1251(a)(1)] provides as follows:

“(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—

(1) At the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;”

Section 212(a)(19) of the Immigration and Nationality Act [8 U. S. C. 1182(a)(19)] provides as follows:

“(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact; . . .”

Rule 18 of this Honorable Court states, insofar as pertinent, as follows:

“1. Counsel for the *appellant* shall file with the clerk of this court . . . a printed brief . . .

2. This brief shall contain, in order here stated—

(c) A concise abstract or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(d) In all cases a specification of errors relied upon which shall be numbered and shall set out separately and particularly *each* error intended to be urged. . . . In all cases when findings are specified as error, the specification shall state *as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous.* . . .

(e) A *concise* argument of the case (preferably preceded by a summary), exhibiting a *clear statement of the points of law or facts to be discussed*, with a reference to the pages of record and the authorities relied upon in support of each point. . . .” [Emphasis added.]

ARGUMENT.

I.

Inasmuch as Appellant's Brief Fails to Conform to the Rules of This Honorable Court, the Appeal Should Be Dismissed as Frivolous and Vexatious.

Appellant has specified for review here seven alleged errors of the court below (App. Br. 4-5). These specifications pertain to certain of the lower court's findings of fact and conclusions of law [R. 12-15]. However, in blithe disregard of this Court's Rule 18(2)(d), none of appellant's specifications ". . . state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous." What appellant's specifications (to say nothing of her argument) amount to is a mere grumble with the suit's outcome below and, not being satisfied with that result, appellant does not ask this Court to review any errors of law below, but merely to scan the entire record for error. This is not the function of this Court and hence appellant's specifications should be disregarded. *Cf. Bellows v. Porter*, 201 F. 2d 429, 433 (C. A. 8, 1953).

Appellee would not object if appellant's brief were merely sloppy or obscure, but appellee does object because it is unfair. Since appellant violated Rule 18(2)(c) of this Honorable Court by failing to state ". . . succinctly the questions involved and the manner in which they are raised," appellee does not know what question or questions it should brief in reply. Relief from this handicap cannot be realized from appellant's "Argument" (App. Br. 6-12). Appellant's "Argument," in total defiance of this Court's Rule 18(2)(e), is not concise, does not make a clear statement of the points or facts sought to be discussed, does not refer to the pages of the record relied

upon in support of each record, and is not preceded by a summary.

In short, appellant's brief has all the clarity of a man mumbling to himself. Hence, since appellant failed to state the questions presented for review here, and since ascertainment of the issues is unduly difficult, if not impossible, from appellant's disordered argument, appellee in desperation resorted to appellant's "Specification of Errors" for enlightenment.

However, Specification I is unintelligible; Specifications II and IV do not specify the alleged errors with particularity or refer to appropriate pages in the record where the errors may be found. Rule 18(2)(b); *Cly v. United States*, 201 F. 2d 806, 808-9 (C. A. 9, 1953), cert. den. 345 U. S. 976. Specification V has been abandoned and therefore need not be considered by this Honorable Court. *Western Natl. Ins. Co. v. LeClare*, 163 F. 2d 337 (C. C. A. 9, 1947). Specifications VI and VII specify nothing and present nothing for review. *United States v. Cushman*, 136 F. 2d 815, 817 (C. C. A. 9, 1943). Specification III improperly alleges more than one error and need not be considered. *Thys Co. v. Anglo-Calif. Natl. Bk.*, 219 F. 2d 131, 132 (C. A. 9, 1955).

Perhaps the outstanding vice of appellant's brief is that it serves no purpose. As was so aptly said in *Thys Co. v. Anglo-Calif. Natl. Bk.*, *op. cit.*, at page 133,

"The purpose of the requirements in respect of briefs is to conserve the time and energy of the court and clearly to advise the opposite party of the points he is obliged to meet. These purposes were not served here."

Where there has been a flagrant disregard of this Court's rules, a motion to dismiss the appeal is appropriate.

Thys Co. v. Anglo-Calif. Natl. Bk., *op. cit.*, at p. 133; *Anderson v. United States*, 218 F. 2d 780 (C. A. 9, 1955); *Hargraves v. Bowden*, 217 F. 2d 839, 840 (C. A. 9, 1954).

It is submitted that appellant's heedless disregard of this Court's rules, coupled with her failure to raise any meritorious issue on this appeal, constitutes sufficient basis for this Court to conclude that this appeal was taken primarily for delay and to therefore dismiss it as frivolous and vexatious. *Cakmar v. Hoy*, F. 2d (C. A. 9, No. 16153, decided March 23, 1959).

II.

The District Court Correctly Decided the Case Below.

A. The District Court Correctly Found That There Was Reasonable, Substantial and Probative Evidence Justifying the Order of Deportation.

The court below found that the Special Inquiry Officer correctly decided that there was reasonable, substantial and probative evidence that appellant had willfully and fraudulently failed to disclose her prior conviction on her visa application. Among the evidence demonstrating the soundness of this holding are the following statements of appellant to an Immigration and Naturalization Service representative on September 6, 1956:

“Q. This application for an immigration visa and alien registration contains the statement, among others, that ‘I have (not) been arrested, indicted for, or convicted of any offense . . .’; were you asked such a question when you applied for your immigration visa? A. Yes.

Q. How did you answer? A. I said ‘No.’

Q. Then, as I understand it, you answered that question falsely. Is that correct? A. It is correct that I answered falsely.

Q. Why did you answer falsely? A. Because I thought they would not give me the immigration and I had need for it for the necessities of life." [Page 6 of appellant's sworn statement of September 6, 1956, introduced as Exhibit 7 (p. 11) in appellant's deportation hearing of December 26, 1956.]

Similar evidence that appellant deliberately concealed her almost continuous residence in the United States from 1943 to the time she executed her visa application on November 1, 1950, is indicated in the Administrative Record at the September 6, 1956 interview, at page 6:

"Q. In the application for an immigration visa made by you on November 1, 1950, at San Ysidro, California, the statement is made that 'Since reaching the age of 14 years, I have resided at the following places during the periods stated, to wit: Tala, Jalisco, Mexico, 1932-1946; Tijuana, Mexico, 1946-1950.' Is that a correct statement? A. I gave that answer. It is not the truth.

Q. Why did you give that answer? A. Because I didn't want to tell them that I had in years past been in the United States.

Q. Why did you not want them to know you were in the United States? A. I didn't think they would give me my visa because they would have wanted to know about my permit to be here, what I have been doing, and would find out about Manuela Aguirre."

It is submitted that the above evidence available to the Immigration authorities is not conjectural, not a scintilla, but is reasonable, substantial and probative evidence that appellant deliberately lied on her visa application.

As the court below so rightly said, "A study of the entire administrative record convinces me that there is sub-

stantial evidence in the record to sustain the ground upon which deportation was based. Indeed, her own admissions at the hearing, where she was represented by counsel, would alone be sufficient to show wilful fraud and misrepresentation.” [R. 9.]

B. Appellant's False Statements in the Visa Application Were Material.

Appellant apparently asks that this Court substitute its judgment for the court below and rule that appellant's false statements would have, even if the truth had been known, not precluded her from admission to the United States. (App. Br. 7-11). But in the instant case appellant's concealment of her prior conviction and her residence were clearly material. Such misrepresentations, as she knew, would forestall or obstruct an investigation into various channels regarding her admissibility. The Government of course was prejudiced or damaged by these false statements because it was deprived of the complete investigation contemplated in such cases by 8 U. S. C. 1202(b). In *United States ex rel. Jankowski v. Shaughnessy*, 186 F. 2d 580 (C. A. 2, 1951), where the concealment of a prior conviction in a visa application was considered, it was held, at page 582, that:

“The misrepresentation and concealment were material. Had he disclosed those facts, they would be enough to justify the refusal of a visa. For surely they would have led to a temporary refusal, pending a further inquiry, the results of which might well have prompted a final refusal.”

And as was said in a recent case involving concealment of true name in visa application:

“Likewise, in the case at bar the appellee’s misrepresentations were made to gain the advantage of acquiring a visa without an appropriate police investigation of most of her adult life as provided by 8 U. S. C. A. 1202(b). That she might have obtained a visa on the true facts does not vitiate the fraud.”

Landon v. Clarke, 239 F. 2d 631, 634.

And see *Ablett v. Brownell*, 240 F. 2d 625, 631 (C. A. D. C. 1957) (fact alien concealed prior conviction in visa application held material regardless of whether or not crime involved “moral turpitude”).

Hence, it is submitted that appellant’s contention that her false statements were immaterial (*i.e.*, even if she had disclosed all on her application, she would have received a visa forthwith) is totally without merit.

Conclusion.

In conclusion, appellee respectfully submits to this Honorable Court:

(1) That the instant appeal should be dismissed because of appellant’s flagrant violations of this Court’s rules.

(2) That the instant appeal should be dismissed as frivolous and vexatious.

But in any event:

(a) That the order of deportation was based upon reasonable, substantial and probative evidence; and

(b) That appellant’s willful and fraudulent misrepresentations in her visa application were material, and hence

for all or any of these reasons the judgment appealed from below should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,

United States Attorney,

RICHARD A. LAVINE,

Assistant U. S. Attorney,

Chief of Civil Division,

HENRY P. JOHNSON,

Assistant U. S. Attorney,

Attorneys for Appellee.



No. 16085 ✓

**United States
Court of Appeals**
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

EUGENE C. DREW,

Appellee.

**Supplemental
Transcript of Record**

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

FILED

FEB 29 1960

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Appellant,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States Court of Appeals
for the Ninth Circuit

No. 16085

UNITED STATES OF AMERICA,

Appellant,

vs.

EUGENE C. DREW,

Appellee.

Appeal From the United States District Court for
the Northern District of California, Southern
Division.

Before: Orr, Hamley and Merrill, Circuit Judges.

ORDER

An examination of the record filed in this case discloses that there are no findings of fact and conclusions of law included therein as required by Admiralty Rule 46 $\frac{1}{2}$, 28 U.S.C.A.

It is ordered that the district court make findings of fact and conclusions of law and that the same be transmitted to the clerk of this court as a supplement to the record in this case. Subsequent to the amendment of the record as aforesaid, counsel may within 10 days submit further typewritten memoranda dealing with the sufficiency and correctness of said findings if they so desire.

/s/ WM. E. ORR,

/s/ FREDERICK G. HAMLEY,

/s/ CHARLES C. MERRILL,

United States Circuit Judges.

[Endorsed]: Filed December 14, 1959.

In the United States District Court for the North-
ern District of California, Southern Division

In Admiralty—No. 20961

In the Matter of the Petition of:

EUGENE C. DREW

For an Order Setting Aside the Forfeiture of His
Wages, Clothing and Effects, for Desertion.

OBJECTIONS AND PROPOSED MODIFICA-
TIONS TO PETITIONER'S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS
OF LAW

1. Respondent United States of America objects generally to Petitioner's proposed findings of fact and conclusions of law, a copy of which is attached hereto as Exhibit A, upon the ground that the proposed findings of fact do not comply with Admiralty Rule 46½ and with the requirements of *Irish v. United States*, 225 F. 2d 3, 8 (9th Cir., 1955), in that the proposed findings are not "so explicit as to give the appellate court a clear understanding

of the basis of the trial court's decision, and to enable it to determine the ground on which the trial court reached its decision."

2. Respondent objects to proposed finding number II upon the ground that it fails to state the essential fact as to whether petitioner, when he "left the SS Mormacgulf and remained away from the vessel," did so without the permission of the master or other person in charge. The definition of desertion is "a quitting of the ship and her service, not only without leave and against the duty of the party, but with an intent not again to return to the ship's duty." *The Italier*, 257 Fed. 712, 714 (2d Cir., 1919), and authorities there referred to. Accordingly a finding as to permission is essential. Respondent proposes to modify proposed finding number II by adding to it the words "all without the permission of the master or other person in charge," in accordance with the admission of the Petitioner in paragraph 5 of his petition.

3. Respondent objects to proposed finding number IV as not showing in what respect the Master's entry of desertion in the log was erroneous, as, for example, that Petitioner had permission to leave and remain away, or that Petitioner, upon leaving and thereafter, never had the intent to remain away, or that Petitioner was justified in some respect. Respondent does not propose explicit terms of modification of this proposed finding since Respondent does not know what conclusion the Court would

reach with respect to the material facts and is unable to determine from the record what facts, if any, constituting suitable modification, have been proved. Respondent notes that if proposed finding number V were sufficiently modified in accordance with Respondent's comments below, similar modification of proposed finding number IV would not be necessary.

4. Respondent objects to proposed finding number V in that it does not, either by itself or in conjunction with any other proposed finding, state an adequate reason for determining that the Master's log entry was erroneous and that Petitioner did not desert or was justified in doing so; and in that the proposed finding does not indicate the nature of the "medical reasons" for leaving the vessel nor show any circumstances bringing the case within any rule under which "medical reasons" might afford a legal excuse or justification for leaving; and in that the proposed finding does not adequately indicate a lack of intent to remain away, not only at the time of leaving but at material times thereafter (*Coffin v. Jenkins*, 5 Fed. Cas. 1188, 1192 No. 2948 [C.C. Mass. 1844, Story, J.]), and in that the proposed finding does not set forth any of the material facts and circumstances bearing upon the existence of "medical reasons" and the existence of intent. Respondent does not propose explicit terms of modification of this proposed finding since Respondent does not know what conclusion the Court would reach with respect to the material facts and

is unable to determine from the record what facts, if any, constituting suitable modification, have been proved.

5. Respondent proposes to modify Petitioner's proposed findings of fact by adding new findings numbers VI and VII, as follows:

VI.

At Port of Spain, Trinidad, on August 14, 1957, the Master granted liberty to the crew, including Petitioner. The sailing time for the next port, Rio de Janeiro, was 6:00 p.m. and it was posted in accordance with custom on the sailing board at least eight hours before sailing time. Under the rules in force and known to Petitioner, liberty would expire and the crew were supposed to be back aboard one hour before sailing. Although Petitioner was on liberty, he spent the afternoon variously about the vessel and on the pier near the vessel. About one-half hour before sailing time, the local agent for the vessel drove onto the pier and talked with Petitioner, pointing down the pier in the direction of the gangway. Petitioner turned around and started toward the gangway while the agent drove on past. When the agent was some distance away, Petitioner turned and ran up the pier in the general direction of the city and was not seen again by those aboard ship. A search disclosed that none of his clothes and effects were left aboard.

VII.

The Petitioner made no attempt to secure medi-

cal treatment in Port of Spain nor any attempt to rejoin his vessel at Rio de Janeiro or any other port but applied to the United States Consul at Port of Spain for repatriation to the United States and was repatriated on consular requisition.

LYNN J. GILLARD,
United States Attorney;

/s/ KEITH R. FERGUSON,
Special Assistant to the
Attorney General;

/s/ GRAYDON S. STARING,
Attorney, Admiralty & Shipping Section, Department of Justice, Proctors for Respondent, United States of America.

Copies of the foregoing Objections and Proposed Modifications to Petitioner's Proposed Findings of Fact and Conclusions of Law were mailed this date to Charles W. Kenady, Jr., Esq; Joseph G. Schumb, Jr., Esq., and Dorr, Cooper & Hays, 260 California Street, San Francisco, California.

Dated: January 27, 1960.

/s/ GRAYDON S. STARING.

EXHIBIT A

In the United States District Court for the Northern District of California, Southern Division

In Admiralty—No. 20961

In the Matter of the Petition of:

EUGENE C. DREW

For an Order Setting Aside the Forfeiture of His Wages, Clothing and Effects, for Desertion.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter coming on regularly to be heard before this Court on the 30th day of June, 1958, and on the 7th day of January, 1959, the Honorable George B. Harris presiding.

The Respondent and Claimant United States of America appearing by Lloyd M. Burke, Esq., United States Attorney; Keith R. Ferguson, Special Assistant to the Attorney General; and Jerry W. Mitchell, Attorney, Admiralty and Shipping Section, Department of Justice, petitioner being present and represented by Court-appointed counsel, and oral and documentary evidence having been introduced by and on behalf of petitioner and the United States; and the Court, having considered all of the evidence and being fully advised in the premises, now makes the following:

Findings of Fact

I.

On July 16, 1957, petitioner signed articles as engine room wiper for a foreign voyage on the SS Mormacgulf which voyage ended on October 4, 1957, at San Francisco, California.

II.

On August 14, 1957, in Port of Spain, Trinidad, petitioner left the SS Mormacgulf and remained away from the vessel and did not rejoin her during the balance of the voyage.

III.

The Master of the SS Mormacgulf on August 14, 1957, entered petitioner as a deserter in the official log book of the vessel and earned wages then due to the petitioner in the amount of \$45.60 were thereafter duly deposited in the registry of this Court.

IV.

Petitioner has presented evidence sufficient to prove that the Master erroneously entered him as a deserter in the official log book.

V.

Petitioner left his vessel on August 14, 1957, for medical reasons and intending to return thereto as soon as his health permitted.

Conclusions of Law

I.

Petitioner has proved that the Master erroneously

entered him as a deserter in the official log book of the SS Mormacgulf.

II.

Petitioner is entitled to an order granting his petition and setting aside the forfeiture for desertion and ordering the Clerk of this Court to draw a check in his favor for the remaining one-third ($\frac{1}{3}$) of the wages deposited in the registry of the Court.

It Is Therefore Ordered that judgment accordingly be entered.

Dated: January .., 1960.

.....,

United States District Judge.

Approved as to form pursuant to Rule 21:

CHARLES W. KENADY,
DORR, COOPER & HAYS,
Proctors for Petitioner.

Disapproved.

LYNN J. GILLARD,
United States Attorney;

KEITH R. FERGUSON,
Special Assistant to
Attorney General;

GRAYDON S. STARING,
Attorney, Admiralty and Shipping Section, Department of Justice, Proctors for Respondent-Claimant.

[Endorsed]: Filed January 27, 1960.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter coming on regularly to be heard before this Court on the 30th day of June, 1958, and on the 7th day of January, 1959, the Honorable George B. Harris presiding.

The Respondent and Claimant United States of America appearing by Lloyd M. Burke, Esq., United States Attorney; Keith R. Ferguson, Special Assistant to the Attorney General; and Jerry W. Mitchell, Attorney, Admiralty and Shipping Section, Department of Justice, petitioner being present and represented by Court-appointed counsel, and oral and documentary evidence having been introduced by and on behalf of petitioner and the United States; and the Court, having considered all of the evidence and being fully advised in the premises, now makes the following:

Findings of Fact

I.

On July 16, 1957, petitioner signed articles as engine room wiper for a foreign voyage on the SS Mormaegulf which voyage ended on October 4, 1957, at San Francisco, California.

II.

On August 14, 1957, in Port of Spain, Trinidad, petitioner left the SS Mormaegulf without permis-

sion of the master or person in charge and remained away from the vessel and did not rejoin her during the balance of the voyage.

III.

The Master of the SS Mormacgulf on August 14, 1957, entered petitioner as a deserter in the official log book of the vessel and earned wages then due to the petitioner in the amount of \$45.60 were thereafter duly deposited in the registry of this Court.

IV.

During petitioner's employment on the SS Mormacgulf in tropical waters his health deteriorated in part due to working conditions in extreme heat in the vessel's engine room and in part due to his own misconduct in over-indulgence with intoxicating beverages.

V.

On August 14, 1957, petitioner, being ill and justifiably concerned about his future well being aboard the vessel, requested medical assistance from the appropriate ship's officers which was refused.

VI.

Petitioner, for good cause, then left the vessel to seek rest and medical assistance on his own.

VII.

Petitioner intended to rejoin the vessel as soon as his health permitted.

VIII.

Thereafter petitioner remained ill and was repatriated aboard another Moore-McCormack vessel to New York where he was treated for fifteen days at the United States Public Health Service Hospital for the illness incurred during his employment.

IX.

Petitioner has presented evidence sufficient to prove that the Master erroneously entered him as a deserter in the official log book.

Conclusions of Law

I.

Petitioner has proved that the Master erroneously entered him as a deserter in the official log book of the SS Mormacgulf.

II.

Petitioner is entitled to an order granting his petition and setting aside the forfeiture for desertion and ordering the Clerk of this Court to draw a check in his favor for the remaining one-third ($\frac{1}{3}$) of the wages deposited in the registry of the Court.

It Is Therefore Ordered that judgment accordingly be entered.

Dated: February 11, 1960.

/s/ GEORGE B. HARRIS,
United States District Judge.

Approved as to form pursuant to Rule 21:

/s/ CHARLES W. KENADY,
DORR, COOPER & HAYS,
Proctors for Petitioner.

Disapproved:

/s/ LYNN J. GILLARD,
United States Attorney;

/s/ KEITH R. FERGUSON,
Special Assistant to
Attorney General;

/s/ GRAYDON S. STARING,
Attorney, Admiralty and Shipping Section, Department of Justice, Proctors for Respondent-Claimant.

Lodged February 2, 1960.

[Endorsed]: Filed February 16, 1960.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below are the originals filed in this Court in the above-entitled case and that they constitute the supplemental record on appeal herein:

Objections and proposed modifications to Petitioner's proposed findings of fact and conclusions of law.

Findings of fact and conclusions of law.

In Witness Whereof, I have hereunto affixed the seal of the above-entitled Court this 16th day of February, 1960.

[Seal] C. W. CALBREATH,
Clerk;

By /s/ J. P. WEBB,
Deputy Clerk.

[Endorsed]: No. 16085. In the United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Eugene C. Drew, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed February 16, 1960.

/s/ FRANK H. SCHMID,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 16,085

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,	} <i>Appellant,</i>
VS.	
EUGENE C. DREW,	
	} <i>Appellee.</i>

**On Appeal from the United States District Court
for Northern District of California,
Southern Division**

BRIEF FOR APPELLANT UNITED STATES

GEORGE COCHRAN DOUB,
Assistant Attorney General
LYNN J. GILLARD,
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FILED

JUN 17 1959

PAUL P. O'BRIEN, CLERK

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No. 16,085

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,

Appellant,

VS.

EUGENE C. DREW,

Appellee.

**On Appeal from the United States District Court
for Northern District of California,
Southern Division**

BRIEF FOR APPELLANT UNITED STATES

JURISDICTION

The jurisdiction of the District Court is founded upon Article III, Section 2 of the United States Constitution, 28 U.S.C. § 1333(1) and R.S. 4604, as amended (cf. 46 U.S.C. § 706) and was invoked by a seaman's petition (R. 3) for the setting aside of a forfeiture for desertion and restoration of the forfeited wages deposited in the registry of the court.

The jurisdiction of this Court rests upon 28 U.S.C. § 1292(3), by reason of a notice of appeal (R. 12)

filed June 30, 1958 from an interlocutory decree ("Order", R. 11) passed June 30, 1958, ordering the restoration of a portion of the forfeiture, and upon 28 U.S.C. § 1291, by reason of a notice of appeal (R. 18) filed February 25, 1959, from a final decree ("Order Setting Aside Forfeiture", R. 16) passed January 7, 1959, ordering the restoration of the remainder of the forfeiture.

STATEMENT OF THE CASE

The Petitioner Drew signed on the S.S. Mormacgulf as a wiper at San Francisco, California, July 16, 1957 (R. 3, 40). He appears to have been a thoroughly unprepossessing sailor (R. 76-77). Not only did he drink excessively, by his own admission (R. 26, 28), but before his desertion he had already missed his ship at Panama (R. 26) and, at La Guaira, Venezuela, had threatened the master to sabotage machinery if the master did not lend him money (R. 27-28, 45-46).

At Port of Spain, Trinidad, on August 14, 1957, the master had granted liberty to the crew (R. 53). The sailing time was 6:00 p.m. (1800) (R. 53, 90) and it was posted in accordance with custom on the sailing board at least 8 hours before sailing time (R. 78-79, 83-84). Liberty expired and the crew were supposed to be back aboard one hour before sailing (R. 84) as Drew knew (R. 27).

On that day, about 1:30 p.m., Drew presented himself in the master's cabin and demanded that the master give him money (R. 51). A little later he

appears to have tried unsuccessfully to sell his spare clothes, and then thrown them overboard (R. 56, 68, 89). Still later he struck up an acquaintance with an unidentified man on the pier and made two or three trips on board to get bags of sandwiches which he took for the man on the pier to eat (R. 68-69, 77-79). During this period he has been described as acting as though he had been drinking (R. 89, 91) but was not "very intoxicated" (R. 92).

About a half hour before sailing time, Drew and his unidentified companion had started walking up the pier, away from the ship, when the local agent for the ship drove onto the pier, stopped, and talked with Drew, pointing down the pier in the direction of the gangway. Drew turned around and started toward the gangway, while the agent drove on a little past the gangway. When Drew saw the agent well clear, he turned and ran up the pier again and around the corner of a warehouse, in the general direction of the uptown area, and he was not seen again (R. 69-70, 79-83, 87-89). A search disclosed none of his clothes and effects left aboard (R. 71-74) and when the ship sailed without him he was logged as a deserter (R. 4, 46-47). He was subsequently returned to the United States on another vessel under consular requisition (R. 4).

Although Drew now claims illness as an excuse, medical attention was available to him in Port of Spain (R. 85) by application to the chief mate ("first mate") a procedure that Drew admits he knew (R. 26). Although he now asserts the contrary, he never

asked the chief mate or the master for medical attention on this occasion or on any other except once in San Pedro for tooth trouble (R. 47, 64-66). The chief mate was available for such a request, if Drew had wished to make it (R. 75, 88, 92). If Drew had any physical complaint at all, he admits it was nothing more than "nerves" (R. 25, 35), presumably the result of excessive drinking (R. 24-26). The record contains no evidence nor even claim that Drew sought any medical attention in Port of Spain, nor until after his return to the United States, when he says that he consulted a doctor at the Marine Hospital who appears to have advised him that his trouble was alcoholism (R. 24, 28).

Drew filed his petition June 25, 1958 (R. 3) claiming that the entry of desertion was erroneous and seeking to have the forfeiture of his wages set aside. The United States filed its claim (R. 6) and answer (R. 7) and the petition was called up for hearing on June 30, five days after it was filed (R. 19). Although the Government had had no opportunity to investigate and prepare, it consented (R. 20) to go forward to the extent of receiving the petitioner's own testimony at that time for his own convenience. Despite a complete lack of evidence at that hearing (R. 19-36) tending to show that the log entry was erroneous, the court, apparently relying in part upon certain statements about actions of the United States Coast Guard (R. 29-30, 33-34) and in part upon the consideration that the petitioner "probably needs it" (R. 30) ordered two-thirds of the forfeiture remitted reserving

only the remainder until the time of hearing any contrary evidence produced by the Government (R. 11).

The Government immediately appealed to this Court (R. 12). Despite the appeal which had been taken, the court below paid out the funds in accordance with its order (Unanswered Request for Admission of Facts, R. 17). Thereafter, in order to avoid piecemeal appeals, this Court, retaining jurisdiction, remanded for the completion of the case below (R. 13-15). After remand, the depositions of the master (R. 36) and chief mate (R. 58) were introduced on behalf of the Government and the cause submitted after which the court below, without findings of fact, ordered the remainder of the forfeiture remitted (R. 16) and the Government appealed (R. 18) from that order as well as the earlier one.

Despite the small amount of money involved, the Government considers this case a particularly appropriate one for appeal in view of the number of points presented by the record as to which appellate guidance should be given the district courts.

SPECIFICATION OF ERRORS

The following errors are relied upon by Appellant:

1. In making its Order filed June 30, 1958 remitting two-thirds of the forfeiture and so deciding the case, the District Court erred in failing to find the facts specially and state separately its conclusions of

law thereon and failing to make any findings of fact or conclusions of law at all in support of the said order, all contrary to Admiralty Rule 46 $\frac{1}{2}$.

2. In making its Order Setting Aside Forfeiture filed January 15, 1959, and so deciding the case, the District Court erred in failing to find the facts specially and state separately its conclusions of law thereon and failing to make any findings of fact or conclusions of law at all in support of the said order, all contrary to Admiralty Rule 46 $\frac{1}{2}$.

3. In deciding the case without any evidence that Petitioner-Appellee intended to return to the vessel, the District Court erred in failing to require Petitioner-Appellee to bear his burden of proving that the master's log entry of desertion which effected the forfeiture, was erroneous.

4. In deciding the case as to remission of two-thirds of the forfeiture by its Order of June 30, 1958 without evidence of extenuating circumstances, the District Court erred in failing to require Petitioner-Appellee to bear his burden of proving such extenuating circumstances, if any existed.

5. The District Court erred in granting the petition in the absence of evidence that Petitioner-Appellee did not desert and that the master erroneously entered his desertion in the log, as claimed in the Petition, and the granting of the Petition was clearly erroneous.

6. The District Court erred in failing to hear the evidence of Respondent-Appellant before deciding the case as to remission of two-thirds of the forfeiture.

7. The District Court erred and abused its discretion in deciding to remit two-thirds of the forfeiture in the absence of evidence of extenuating circumstances attending the desertion.

8. The District Court erred and denied Appellant due process of law in deciding the case or a part of it only five days after the Petition was filed and without proper notice and opportunity for Respondent-Appellant to investigate and prepare its case and present evidence in its defense.

9. The District Court erred in ordering the payment of and paying two-thirds of the forfeiture, pursuant to its Order of June 30, 1958, subsequent to the taking of an appeal from such order, without jurisdiction to do so and in violation of the stay imposed by such appeal and of the jurisdiction of the Court of Appeals by reason of such appeal.

SUMMARY OF ARGUMENT

The court below made no findings of fact or conclusions of law, as required by the rule, and its orders deciding the case stand unsupported by essential findings and must be reversed for this alone. But, moreover, the court below could not have made, upon the record in this case, the necessary finding that Petitioner-Appellee intended to return to his vessel and therefore was not a deserter. In setting aside the forfeiture, the court below failed to require the Petitioner-Appellee to bear his burden of proof that the

log entry was erroneous, since the record is actually barren of any substantial evidence to that effect and, on the contrary, shows clearly by the Petitioner-Appellee's own statements and conduct the correctness of the entry. The Petitioner-Appellee's drinking and consequent "illness" constitute, under the authorities, no excuse for desertion. The court below improperly considered statements and speculation about Coast Guard proceedings, the results of which are not even admissible, much less competent to affect the court's decision.

In addition, the court below should be corrected as to procedure, for its guidance in future cases. It is improper to hear these adversary proceedings on short notice, without opportunity to the Government to investigate and take testimony, if necessary, from witnesses, some of whom are all too likely to be out of the country; such procedure is a denial of due notice and opportunity to defend. It is improper to decide any part of the case and to remit even part of the forfeiture after hearing only one side of the case; such procedure is not the exercise of legal discretion but simply arbitrary conduct. Finally, it is improper to pay out the funds after notice of appeal, since the appeal stays the case and transfers jurisdiction of the res to the Court of Appeals.

ARGUMENT

I. THE DECREES BELOW ARE INVALID FOR LACK OF ANY FINDINGS OF FACT TO SUPPORT THEM

The orders of the District Court disposing of the forfeited funds in this case are completely unsupported by findings. Nor is this a case in which there are merely inadequate findings; there are simply none at all. Admiralty Rule 46 $\frac{1}{2}$ provides:

“In deciding cases of admiralty and maritime jurisdiction the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rule 49.”

Although it has been the practice of the court below to make findings and conclusions as required by the rule in these cases,¹ the requirements of Rule 46 $\frac{1}{2}$ were completely disregarded here. Decrees unsupported by findings cannot stand. *Victory Towing Co. v. Bordelon*, 219 F.2d 540, 1955 A.M.C. 553 (5th Cir.); cf. *The Silverpalm*, 79 F.2d 598, 1935 A.M.C. 1506 (9th Cir.).

Vague, general statements, operating by implication or reference, even if there were any, would not comply with the rule, which requires that “Findings of Fact should be clear, coherent and self-sustaining.” *The Plow City*, 122 F.2d 816, 819, 1941 A.M.C. 1564,

¹See, e.g., *Petition of Scott*, 143 F.Supp. 175, 177, 1956 A.M.C. 2160, 2163 (N.D.Cal.); *Petition of Ritchie*, 130 F.Supp. 645, 647 (N.D.Cal. 1955).

1569 (3rd Cir.). This Court has laid down the standard for findings of fact in *Irish v. United States*, 225 F.2d 3, 8 (9th Cir. 1955), as follows:

“The findings should be so explicit as to give the appellate court a clear understanding of the basis of the trial court’s decision, and to enable it to determine the ground on which the trial court reached its decision.”

In the *Irish* case, the weakness of the findings was that they gave “no hint as to the factual basis for the ultimate conclusion.” Here, where no findings and conclusions were made at all, the decrees stand unsupported and must be reversed.

II. THE COURT BELOW ERRED IN FAILING TO REQUIRE THE PETITIONER-APPELLEE TO BEAR HIS BURDEN OF PROOF

A. Petitioner-Appellee Had the Burden of Proving That the Master Erroneously Made an Entry of Desertion

The Petitioner-Appellee, coming to court for affirmative relief, had the same burden of proof that any party seeking such relief has, to prove the allegations on which his claim to relief is based. We would not have supposed there was any doubt of this and we do not understand that the Appellee actually contends otherwise, but the lower court’s expressions in conducting the case and its ultimate determination of the case leave little doubt that the court did not view the Petitioner-Appellee as having the burden of proving his claim.

The Appellee, by his Petition below, sought to set aside an accomplished forfeiture for desertion. The penalty of forfeiture is provided in R.S. 4596 (as amended, 46 U.S.C. §701) (Appendix B) and the procedure of making that penalty effective is provided in R.S. 4597 (as amended, 46 U.S.C. §702) (Appendix B) and R.S. 4604, as amended (Cf. 46 U.S.C. §706) (Appendix B). Under that procedure the forfeited funds were deposited in the registry below. R.S. 4604, in providing for such deposit of "wages which . . . are forfeited for desertion", leaves no doubt of the character of the forfeiture as an accomplished fact, by reason of the log entry, subject only to the right of the seaman to petition the court under Admiralty Rule 42 and attempt to show that the log entry was erroneous. The log entry is therefore not a mere "charge", as the judge below regarded it (R. 20), nor merely evidence of desertion, although it is that, also.² It is a legal act, analogous to a judgment, required by the statute and producing the legal consequence of working forfeiture under the terms of the statute.

Of course the Petitioner-Appellee had the burden of proving his contention that the log entry was erroneous, as, in his Petition, he prayed the court to determine (R. 5). Under the statute, and in accordance with authorities already cited, the forfeiture was ac-

²The log entry is "prima facie evidence" (proof) of desertion. *Douglas v. Eyre*, 7 Fed. Cas. 975, 978, No. 4,032 (E.D.Penn. 1830) ("But I hold the entry itself to be prima facie evidence of its truth in every particular; and to be falsified it must be disproved by satisfactory evidence."); *The Philadelphia*, 23 Fed. Cas. 1069, 1070, No. 13,973 (D.Penn. 1805).

complished by the master's entry of the desertion in the official logbook. The Petitioner below sought to have the forfeiture set aside by proving that the log entry was erroneous, i.e. by proving that he did not in fact desert. Desertion is not just a defense to his claim; the erroneous character of the entry, which is to say, the fact that he did not desert, if true, is the essential element of his cause of action. Like any other plaintiff or petitioner he must, of course, both plead and prove the elements of his claim. In this he is not aided by any presumption, for in addition to the log entry's being a legal act working a forfeiture, as contrasted with mere evidence, it is an entry required by law in an official record³ and, as such, has every presumption in its favor.

The burden of proof which petitioner, like any other plaintiff, must bear, rests not only upon the universal rule of procedure in this respect but also upon particular grounds of reason in this class of cases. The deserter is the only person with detailed knowledge of his own actions and motivations. Here, as in many other instances, such as cargo cases and bailment cases generally, as well as *res ipsa loquitur* cases, reason imposes the burden of showing the truth upon the party having the unique opportunity of knowing it and being, therefore, in the best position to prove it.⁴

³See R.S. 4290 (as amended, 46 U.S.C. §201) and R.S. 4597 (as amended, 46 U.S.C. §702).

⁴Justice Story, in passing upon the evidence and upholding a forfeiture for desertion, said of the seaman's failure to bring forward proof of his case, that "it was peculiarly within his privity and knowledge how the matter stood." *Coffin v. Jenkins*, 5 Fed. Cas. 1188, 1191, No. 2,948 (C.C.Mass. 1844).

Not only have the lower courts regularly recognized that the burden of proof lay with petitioner⁵ but this Court itself has so recognized in *Humes v. Alaska Transportation Company*, 180 F.2d 534, 1950 A.M.C. 508 (9th Cir.) (No. 12,038). Although the opinion of this Court, affirming the district court, did not discuss the burden of proof, the district judge at the outset of his decision in the *Humes* case (*Humes* Apostles on Appeal 3) imposed the burden on Humes and found he had not sustained it, and the burden of proof was one of the issues on appeal briefed by both Humes and the United States, as shown in the records of this Court.

⁵*Petition of Sanuiti*, 124 F.Supp. 69, 1954 A.M.C. 990 (N.D. N.Y.). Courts of this circuit have repeatedly expressly held in unreported cases that the burden of proof is on petitioner. See, e.g., the findings and conclusions in the following unreported cases, certified copies of which will be submitted to the Court: *Petition of Strong*, W.D.Wash. No. 16378 (Judge Bowen); *Petition of Lydoff*, W.D.Wash. No. 16379 (Judge Bowen); *Petition of England*, W.D.Wash. No. 16347 (Judge Bowen); *Petition of Gray*, D.Ore. No. 9781 (Judge East); *Petition of Hosking*, N.D.Cal. No. 20984 (Judge Hamlin); *Petition of Gargano*, N.D.Cal. No. 20946 (Judge Goodman); *Petition of Camponeschi*, N.D.Cal. No. 20934 (Judge Carter); *Petition of Okoorian*, N.D.Cal. No. 20911 (Judge Goodman).

And the reported cases show that the petitioning seaman is treated as having the burden of proof. See, especially, *Petition of Scott*, 143 F.Supp. 175, 1956 A.M.C. 2160 (N.D.Cal.); *Ex Parte Barnes*, 1954 A.M.C. 2168 (S.D.Miss.); *In re Mitchell*, 84 F.Supp. 871, 1948 A.M.C. 1634 (D.Ore.); *Petition of Murphy*, 73 F.Supp. 710, 1947 A.M.C. 394 (S.D.N.Y.); *Petition of Magdalayo*, 1948 A.M.C. 1896 (S.D.N.Y.).

B. Petitioner-Appellee Has Failed to Bear His Burden and the Evidence Overwhelmingly Shows the Correctness of the Log Entry

1. The evidence plainly shows that Appellee intended not to return to his vessel

For conclusive evidence that Petitioner-Appellee did not intend to return we need go no further than Article 8 of the Petition (R. 4). A reading of his own words in that Article leave no doubt that he was leaving the ship without permission and without intending to sail with her or return to her. This is confirmed by all the evidence of Drew's conduct. The sailing time was posted (R. 78-79, 83-84) and it is nowhere suggested that he was not aware of it. He disposed of his extra clothes before leaving (R. 56, 68, 89) or, at any rate, left none behind (R. 71-74). When evidently urged by the agent to go aboard just before sailing time, he fled (R. 69-70, 79-83, 87-89). Except for Drew's own uncertain claim that he left some clothes aboard, all these facts stand uncontradicted. His story of illness reduces by common agreement to "nerves" or the "shakes" from excessive drinking, while his claimed requests for medical attention are completely falsified (R. 26, 47, 64-66, 75, 88, 92) and he does not even suggest that he sought any medical attention in Port of Spain from the agent, the consul or anyone else.

The most that the Appellee could really say in his behalf was this testimony (R. 23):

At that time, there was another seaman there, not from the same vessel, and I was asking him

about it. He said, "you can always rejoin your ship at the next port."

So it is my intention to rejoin it at the next port.

By what means did this seaman in Port of Spain expect to meet his vessel at Rio de Janeiro, 3000 miles away (R. 80)? And how did it come about that, instead of doing so, he applied to the American consul and had himself sent back to the United States, as a destitute seaman on consular requisition⁶ (Petition, Art. 14, R. 4)? The event proves that, if he ever entertained an intention of rejoining, he abandoned it, for the record shows no effort to carry it out. His testimony in this respect has the tone of a happy inspiration on the witness stand. Justice Story said, in *Coffin v. Jenkins*, 5 Fed. Cas. 1188, 1190, No. 2,948 (C.C. Mass. 1844):

"... But I should go farther and say, that if, upon the eve of the departure of the ship from the port on the voyage, a seaman should, with a full knowledge of the fact of her intended departure, voluntarily or secretly without leave quit the ship that would of itself be strong *prima facie* evidence of a positive intention to desert, and it would require the fullest and clearest evidence of

⁶Transportation of destitute seamen on consular requisition is at Government expense. See R.S. 4577 (as amended 46 U.S.C. §678) and R.S. 4578 (as amended 46 U.S.C. §679). Thus Appellee's passage was presumably paid from the fund into which his forfeited wages should be deposited. See R.S. 4604, as amended (cf. 46 U.S.C. §706) and R.S. 4545 (as amended 46 U.S.C. §628).

bona fides, and sincerity of intention, to displace the presumption.”

With what is the “fullest and clearest evidence” we need not concern ourselves, for here we have no evidence whatever in Appellee’s favor and the record shows conclusively the correctness of the log entry of desertion. Indeed, the lower court’s own remarks at the hearing (R. 29-30, 33) appear to us to reveal that the judge below was not deceived and granted relief in spite of, rather than because of, his belief with regard to the issues.

2. Appellee’s drinking and consequent “illness” afford him no excuse.

This Court need look no farther than its own ruling to assure itself that drunkenness will not negate or excuse desertion. In *The Mermaid*, 115 Fed. 13 (9th Cir. 1902), the seaman became intoxicated while a visitor on a neighboring vessel. Thereafter, he refused to obey an order to return to his own ship and was logged as a deserter. The district court had determined that the shipping articles were void for indefiniteness, but added that:

“I do not regard drunkenness as any excuse for desertion, and I would not hesitate to declare a forfeiture of wages in this case, for desertion, if the libelant had bound himself by signing lawful shipping articles * * *.” (*The Mermaid*, 104 Fed. 301, 302 [D. Wash. 1900]).

Disagreeing with the lower court’s conclusion as to the lawfulness of the shipping articles, this Court re-

versed and remanded with instructions to dismiss the seaman's libel:

"We agree with the district court that drunkenness was no excuse for the conduct of [the seaman], and that his action in leaving the vessel as he did was desertion. (115 Fed. at 14).

In *The Ericson*, 8 Fed. Cas. 751, No. 4,510, (D. Cal. 1876), the seaman left his ship, without permission, "to take a drink." Subsequently, the master went ashore and found him in a dram-shop. While they were returning to the vessel in the company of other members of the crew whom the master had located, the seaman broke away and ran. Holding that he had thus forfeited his wages for desertion, the court stated:

"The natural and inevitable consequence of this was to compel the master to proceed to sea without him. He must be held to have intended what was the necessary result of his conduct. He cannot, by alleging drunkenness, or rather forgetfulness of all that occurred except his starting back, escape the consequences of his own acts. . . . His running away was under the circumstances, an act of desertion, and must have been so intended by him. Whether that intention was formed while under the influence of liquor, I consider immaterial. (8 Fed. Cas. at 752)."

The Appellee's "sickness" was shown to be no more than a feature of his drunkenness and a consequence of his own wrongdoing. But, in any event, the seaman may not, at his own discretion, break his contract whenever he feels ill. Of course, he is entitled to have

appropriate medical care furnished by the shipowner, but he is not entitled to abandon his ship merely to seek care on his own terms nor certainly because he suffers from "nerves" aboard.⁷ The matter is well put by Judge Bowen in his unpublished oral opinion in *Petition of Strong*, No. 16378 and *Petition of Lydoff*, No. 16379, W.D. Wash., May 14, 1958 (printed in Appendix C) where he says:

"Neither party to a ship's articles relating to a seaman's service on board the vessel has a right to repudiate that contract during the time it is in effect unless in the terms of the contract itself they reserve and express the right to change it and, for example, shorten the work period. No such reserved method of termination is advanced here in behalf of the petitioners, nor is there any evidence before the Court that the petitioners had a right under the contract itself or any other conceivable right to terminate their contract under the shipping articles at the time they deserted the ship.

* * *

Everyone has a warm spot in his heart for American seamen who risk the vicissitudes of a voyage, but many a seaman long before we had refrigeration on ships for all food and long before we had electric fans on board ships, long before we had proper ventilation and proper sleeping and dining quarters on board ships, as was the case in the oldtime sailing ship days honored in our early American history, when men signed on these sail-

⁷Compare cases on seamen's pleas of oppression and danger of violence as excuse, such as *Petition of Scott*, 143 F.Supp. 175, 1956 A.M.C. 2160 (N.D.Cal.); *The Leiderhorn*, 99 Fed. 1001 (N.D.Cal. 1900).

ing ships as members of the crew and stayed with those ships even though troubled by illnesses a great deal more aggravated than those with which these men were afflicted.”

The plea of illness was also rejected by the lower court in the decision affirmed by this court in *Humes v. Alaska Transportation Company*, 180 F. 2d 534, 1950 A.M.C. 508 (9th Cir.). The lower court’s unpublished decision⁸ reads in part as follows:

“ . . . Both parties are bound according to the terms stated in the contract. Neither is entitled to terminate the contract without just cause. That applies to both sides. These two men, in my opinion, got scared by health conditions up there and I think they were not justified in getting scared. I think after they got these colds each of these two men decided that he didn’t want to pursue the remainder of this voyage and he was willing to suffer the consequences of wrongful termination by him of his part of the contract in order for him to escape the performance by him of the remainder of his contract for that part of this voyage from Skagway to Texas ports. These men did not turn out to have any serious health conditions that could not have been properly treated and dealt with if they had remained on board the Clove Hitch, where they were supposed to serve pursuant to their articles. The Court does not believe that the ship was not provided with sufficient medicine kit to take care of any ordinary colds conditions.

⁸Page 3 of the Apostles on Appeal in the *Humes* case, No. 12,038, in the records of this Court.

The conduct of these two petitioners, Mr. Humes and Mr. McKanna, during the next two to five days after they left the Clove Hitch, at Skagway, does not justify the contention of either one of them that the facilities on board the Clove Hitch for treating their colds were inadequate. Mr. Humes took an airplane to Seattle. He did not call upon a doctor immediately upon coming to Seattle nor go to a hospital in Seattle. He went home and went to bed, and stayed there from Thursday until Monday, and then he went to see a doctor. He could have done the same thing aboard the Clove Hitch. He could have stayed in his bunk or he could have gone to sick bay. There isn't any question in my mind on the proof here that there was an adequate ship's bay provided on the vessel.

So far as the Petitioner McKanna is concerned, he went on board the Princess Nora as a passenger and he went to his room where he stayed for about three days while the vessel was proceeding to its destination in Vancouver, B.C., and that he got some medicine from the stewardess during that voyage. He did not do anything more in the treatment of his cold for virus X or whatever it was he had than he could have conveniently done if he had stayed on board the Clove Hitch."

The decision in the *Humes* case is strikingly applicable here, and so also is the unreported decision in *Petition of England*, W.D. Wash. No. 16,347 (printed in Appendix C). Here neither drinking nor "nerves" nor the two in combination can stand as justification for Appellee's leaving his vessel or excuse for his desertion.

3. The action of the Coast Guard has no bearing on this proceeding

The court below repeatedly referred to the Coast Guard Proceedings, brought under R.S. 4450 (as amended, 46 U.S.C. § 239), with reference to Appellee's seaman's document (R. 29, 30, 33, 34). At one point (R. 34) the court states that it will "incorporate the findings of the Coast Guard" and we would infer from other references that these were understood to be findings of desertion. At the same point and elsewhere (R. 30) the court refers to penalties by the Coast Guard as, in effect, a reason for not complying with the law with respect to forfeiture of wages. All these references to Coast Guard proceedings, whether for one motive or another, are improper and if competent evidence of Coast Guard findings had been offered, which it was not, it would not have been admissible in evidence. *The Charles Morgan*, 115 U.S. 69, 77 (1885); see *Steward v. Atlantic Refining Co.*, 240 F.2d 715, 1957 A.M.C. 222 (3rd Cir.). Whether the court follows the Coast Guard findings or holds one way because the Coast Guard held the other, the reference to Coast Guard proceedings is wrong. It is the independent judgment of the court to which the parties are entitled.

III. THE COURT BELOW COMMITTED OTHER PROCEDURAL ERRORS AS TO WHICH IT SHOULD RECEIVE GUIDANCE

A. The Procedure of the Court Below in Hearing These Cases too Hastily for Investigation and Preparation Falls Short of Due Process

This case was called up for hearing below, as though it were a mere motion, five days after the filing of the

Petition, under a standing Order In the Matter of Hearing of Petitions by Deserting Seamen for Return of Wages and Effects, which reads as follows:

ORDERED that on and after September 1, 1954, the hearing of petitions filed by deserting seamen for the return of wages and effects be held before the Master Calendar Judge on the third day following the service of a copy of such petition on the United States Attorney for this District.

Such peremptory hearing allows no time for investigation of existing records even, to say nothing of learning non-record facts and securing testimony, and yet makes it necessary for the United States to oppose many petitions which may be meritorious, simply because their merits cannot be determined. Only in the court below is such peremptory procedure used. The other districts on this coast follow a settled practice of setting hearings not less than 60 days from filing, by analogy to the rules applied to Government pleadings in other cases.⁹

⁹In the Western District of Washington the court files in the unreported cases from that district referred to in footnote 5, *supra*, show that 60 days or more is always allowed. This is pursuant to a standing order in the clerk's office, entitled "Procedure for the Return of Wages and Effects of Deceased or Deserting Seamen" which provides that the return day of process "must be sufficiently in advance to assure the United States of 60 days notice of the hearing." In the District of Oregon, the court files in the cases of *Petition of Gray*, *supra*, footnote 5, and *Petition of Joffern*, No. 9804, show the practice of allowing 60 days or more to plead and of giving substantial time thereafter, if necessary, to obtain evidence. In the Southern District of California, the court files in the cases of *Petition of Bolak*, No. 2372-SE and *Petition of Richardson*, No. 2343, 1955 A.M.C. 842, show that in that district the United States is given as little as 30 days to plead with substantial time thereafter as necessary to obtain evidence before the trial.

Examination of the record in *Humes v. Alaska Transportation Co.*, 180 F.2d 534, 1950 A.M.C. 508, (No. 12,038) discloses that this Court is not guided by any arbitrary standard but is disposed to provide and to take the time necessary for a proper disposition of these cases. And as this Court has clearly indicated by its action in the recent case of *United States v. Staples*, 256 F.2d 290, 1958 A.M.C. 728 (9th Cir.), a desertion case on appeal from the Northern District of California, the requirements of law are not met when the United States is not given adequate time to investigate the case, to take discovery procedures if appropriate, and to determine whether it should avail itself of the testimony of witnesses who, in many cases, may be at sea or overseas.

These proceedings are not to be heard as though on motion but are to be set down in an orderly manner for regular trial upon competent evidence as in other cases. Cf. *United States v. Staples*, 256 F.2d 290, 1958 A.M.C. 728 (9th Cir.). Such a proceeding cannot be disposed of consistently with due process of law when only a few days are allowed for preparation. Such procedure is an invitation to perjury and fraud upon the court, and the court below should be advised to be guided by its own local Admiralty Rule 9, allowing 60 days in cases where the "United States is the respondent."

B. The Court Below Abused Its Discretion in Remitting a Portion of the Forfeiture Without Hearing the Cause

The Government has cheerfully recognized, in all cases like the present one, a discretion in the court to mitigate the forfeiture in appropriate cases, in the absence of explicit statutory power,¹⁰ in accordance with a time honored rule, which was well stated by Justice Story in *Coffin v. Jenkins*, 5 Fed. Cas. 1188, 1192, No. 2,948 (C.C.Mass. 1844):

There are, without question, cases, where desertion will not be visited by a total forfeiture of wages, or quasi wages. But what are the cases to which the mitigation or compensation is applied? They are those, in which the party has a strong excuse, founded on gross misconduct or harsh usage on the other side; and where the party is, therefore, more in the situation of a victim than of a sinner; or where, having a locus poenitentiae, he has acknowledged his fault, and offered to return to duty within a reasonable time, and his services have been improperly rejected. It is to such cases, and cases of a similar nature, that the rule of compensation or mitigation is, in the benignity of the maritime law, fairly and justly and upon principles of public policy, applied.

¹⁰The Government has consistently urged, and the lower courts have accepted, that the courts, in exercising discretion to mitigate, should be guided by the standard of R.S. 4610, as amended (cf. 46 U.S.C. §711) that the forfeiture not be reduced "to less than one-third of its original amount." R.S. 4610 does not apply, of its own force, to proceedings like the present one, where the mode of recovery of the forfeiture is by direct payment from the master into Government accounts, but only to cases where, for one reason or another, it is necessary for the United States Attorney to bring suit against the seaman. Nevertheless, uniformity of discretion seems highly desirable and the Congressional standard expressed in R.S. 4610 is persuasive of what the limit of discretion should be.

Here, there is a total absence of all exculpatory and alleviating circumstances. The opportunity for repentance or return was given, and was not embraced; but was deliberately and obstinately refused. Under such circumstances, it appears to me, that this court would ill perform its duty, if it did not pronounce for a total forfeiture.

Not only is there an absence in this case of any of the "exculpatory and alleviating circumstances" which would be grounds for an exercise of discretion, but the court below, by deciding to remit before hearing the Government, indicated complete indifference to the existence of appropriate circumstances.

The term "discretion" denotes the absence of a hard and fast rule. . . . When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge, to a just result. (*Langnes v. Green*, 282 U.S. 531, 541, 1931 A.M.C. 511, 518.)

It surely requires no citation to convince the Court that a decision made, as here, without hearing the evidence in opposition, is arbitrary and an abuse of discretion.

C. The Action of the Court Below in Paying Out Funds From the Res While an Appeal Was Pending Was a Wrongful Invasion of This Court's Jurisdiction

From a Request for Admission of Facts (R. 17) which, as the Docket Entries (R. 93) show, produced

an admission by failure to answer, under Admiralty Rule 32(b), it appears that the funds ordered paid to Appellee at the first hearing were paid out despite the lower court's knowledge that an appeal had been taken. We should scarcely make a point of this, were it merely the result of inadvertence, rather than a continual problem, illustrated by this Court's record in the case of *United States v. Staples*, 256 F.2d 290, 1958 A.M.C. 728 (9th Cir.) (No. 15,730), where it was necessary to obtain an immediate stay order from Judge Healy and serve it upon the clerk below to prevent disbursement of the funds in an effort to frustrate appeal.

The taking of the appeal, by operation of law, vacates the decree and stays all proceedings below, including particularly any disposition of the res, and such disposition, after even a mere oral notice of appeal in open court, is wrongful. *The Rio Grande*, 23 Wall. 458 (1874). The lower court should be firmly reminded of this rule and of its application to the present class of cases.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decrees of the court below should be reversed and the court directed to enter a decree confirming the forfeiture and ordering the forfeited wages paid into the Treasury of the Fund for the Relief of Sick and Disabled and Destitute Seamen, in accordance with R.S. 4545 (as amended, 46 U.S.C. §628) (Appendix B), and that the court below should receive appropriate guidance as to the various errors specified.

Dated, San Francisco, California,
June 16, 1959.

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(Appendices A, B and C Follow.)



Appendices.

Appendix A

TABLE OF EXHIBITS

EXHIBIT	IDENTIFIED	RECEIVED
Respondent's Exhibit No. 1 to Dep. of Sturdivant (Shipping Articles) (Read into record and withdrawn by consent)	40	15-16
Respondent's Exhibit No. 2 to Dep. of Sturdivant (Official Log) (read into record and withdrawn by consent)...	43	15-16
Respondent's Exhibit No. 2 to Dep. of Parker (page from Medical Log)....	66	15-16
Petitioner's Exhibit A to Dep. of Parker (Sketch)	83	15-16

Appendix B

Statutes Involved

R.S. 4596 (as amended, 46 U.S.C. 701) provides in pertinent part:

Whenever any seaman who has been lawfully engaged or any apprentice to the sea service commits any of the following offenses, he shall be punished as follows:

First. For desertion, by forfeiture of all or any part of the clothes or effects he leaves on board and of all or any part of the wages or emoluments which he has then earned.

R.S. 4597 (as amended, 46 U.S.C. 702) provides:

Upon the commission of any of the offenses enumerated in section 701 of this title an entry thereof shall be made in the official log book on the day on which the offense was committed, and shall be signed by the master and by the mate or one of the crew; and the offender, if still in the vessel, shall, before her next arrival at any port, or, if she is at the time in port, before her departure therefrom, be furnished with a copy of such entry, and have the same read over distinctly and audibly to him, and may thereupon make such a reply thereto as he thinks fit; and a statement that a copy of the entry has been so furnished, or the same has been so read over, together with his reply, if any, made by the offender, shall likewise be entered and signed in the same manner. In any subsequent legal proceedings the entries hereinbefore required shall, if practicable, be produced or proved, and in default of such production or

proof the court hearing the case may, at its discretion, refuse to receive evidence of the offense.

R.S. 4604, as amended (cf. 46 U.S.C. 706) provides:

All clothes, effects, and wages which, under the provisions of this title, are forfeited for desertion, shall be applied, in the first instance, in payment of the expenses occasioned by such desertion, to the master or owner of the vessel from which the desertion has taken place, and the balance, if any, shall be paid by the master or owner to any shipping commissioner resident at the port at which the voyage of such vessel terminates; and the shipping commissioner shall account for and pay over such balance to the judge of the district court within one month after the commissioner receives the same, to be disposed of by him in the same manner as is prescribed for the disposal of the money, effects, and wages of deceased seamen. Whenever any master or owner neglects or refuses to pay over to the shipping commissioner such balance, he shall be liable to a penalty of double the amount thereof, recoverable by the commissioner in the same manner that seamen's wages are recovered. In all other cases of forfeiture of wages, the forfeiture shall be for the benefit of the master or owner by whom the wages are payable.

R.S. 4545 (as amended, 46 U.S.C. 628) provides:

A district court, in its discretion, may at any time direct the sale of the whole or any part of the effects of a deceased seaman or apprentice, which it has received, and shall hold the proceeds of such sale as the wages of deceased seamen are held.

When no claim to the wages or effects or proceeds of the sale of the effects of a deceased seaman or apprentice, received by a district court, is substantiated within six years after the receipt thereof by the court, it shall be in the absolute discretion of the court, if any subsequent claim is made, either to allow or refuse the same. Such courts shall, from time to time, pay any moneys arising from the unclaimed wages and effects of deceased seamen, which in their opinion it is not necessary to retain for the purpose of satisfying claims, into the Treasury of the United States, and such moneys shall form a fund for, and be appropriated to, the relief of sick and disabled and destitute seamen belonging to the United States merchant marine service.

Appendix C

In the District Court of the United States
for the Western District of Washington
Northern Division

<p>In the Matter of the claim of John W. Strong, an alleged deserting seaman, for payment to him of his wages, Petitioner, vs. United States of America, Respondent.</p>	<p>No. 16378. Before Judge Bowen. Wednesday, May 14, 1958.</p>
<p>In the Matter of the claim of Mike Lydoff, an alleged deserting seaman, for payment to him of his wages, Petitioner, vs. United States of America, Respondent.</p>	<p>No. 16379.</p>

COURT'S ORAL OPINION

THE COURT: From a preponderance of the evidence of these two cases, the Lydoff case and the Strong case, and in respect to each and both of them, the Court finds, concludes and decides as follows:

That each of these petitioners as members of the crew of the COHOCTON signed valid and binding shipping articles to serve for approximately twelve months

for a voyage or series of voyages described in the articles, and about six months thereafter, on or about the 15th day of June, 1957, each of the petitioners knowingly, intentionally and willfully deserted the vessel at the Island of Guam and at his own expense by airplane from Guam to Los Angeles, an airport convenient to their American stateside homes.

That both of the petitioners were specifically reminded by the Master before they left the ship that at public expense they would be provided with adequate medical treatment and care which was available in Guam, and that they would be regarded as deserters if they left the ship under the circumstances, but they nevertheless proceeded with their plans and did violate the express provisions of their contract of service, the shipping articles, obligating them to the usual seaman's duties as members of the crew of the vessel, and they did lay themselves liable, each of them did, to the penalties of the law in respect to the willful and intentional desertion on the part of seamen members of a ship's crew.

It is true that each of the petitioners, as disclosed by the evidence, assigned his own particular illness as a reason for leaving the vessel, the petitioner Lydoff claiming that he was suffering from high blood pressure and the petitioner Strong claiming that he was suffering from bloody and protruding hemorrhoids;

That there is no question but that the Master, upon being advised by the petitioners of their intention to desert the vessel, offered to see that they received proper medical treatment and care without expense to

them in Guam at government facilities which had been recognized as adequate Naval medical facilities, maintained in part for the proper care and attention of American merchant seamen who might have occasion to be at the Island of Guam;

That notwithstanding such offer on the part of the Master, each of the petitioners persisted in his plan to intentionally and willfully desert the ship;

That the Court finds no extenuating circumstances in these facts.

Neither party to a ship's articles relating to a seaman's service on board the vessel has a right to repudiate that contract during the time it is in effect unless in the terms of the contract itself they reserve the express right to change it and, for example, shorten the work period. No such reserved method of termination is advanced here in behalf of the petitioners, nor is there any evidence before the Court that the petitioners had a right under the contract itself or any other conceivable right to terminate their contract under the shipping articles at the time they deserted the ship.

In view of the extreme solicitude expressed by the Master for these men and for their proper medical care, the Court is unable to find any extenuating circumstance making less aggravated the desertion of the ship by each one of the petitioners, and in particular the Court is unable to find here any such extenuating circumstance that would compare with the seaman's drunkenness that may have been the excusable circumstance regarded by the Court as extenuating in the

Mitchell case, 84 Fed. Supp. 871, where a seaman deserted the ship and where the Court mitigated a portion of the forfeiture of wages;

That this is one of the most inexcusable ship desertions by crew members I have ever seen or had called to this Court's attention during my service here. Everyone has a warm spot in his heart for American seamen who risk the vicissitudes of a voyage, but many a seaman long before we had refrigeration on ships for all food and long before we had electric fans on board ships, long before we had proper ventilation and proper sleeping and dining quarters on board ships, as was the case in the oldtime sailing ship days honored in our early American history, when men signed on these sailing ships as members of the crew and stayed with those ships even though troubled by illnesses a great deal more aggravated than those with which these men were afflicted.

As to petitioner Strong, there was no unusually dangerous condition as to his hemorrhoids. Many men at the height of their working seasons experience protruding bloody piles or hemorrhoids and continue with their work with the aid of simple localized treatments.

And referring to the high blood pressure which the petitioner Lydoff contends he had, there was nothing alarming about that, and the outside and room temperature conditions of his work might have been expected to have caused occupational increase in his blood pressure to the extent noted by the private doctors who examined him. For a young man of his general health and strength it was wholly inexcusable

to leave the ship, just as it was in the case of petitioner Strong, refusing adequate proper medical care and attention which was offered him by and on behalf of the ship and merely to accomplish some alleged desire to have his own physician treat him;

That it is the finding, conclusion and decision of the Court that the steamship company turned in no gear of the seamen to this Court and that each of the petitioners took all of his personal effects, gear and belongings with him when he deserted the ship, and that each of the petitioners has forfeited and does forfeit all of his unpaid wages deposited by the Shipping Commissioner in the registry of this Court and which is now subject to the order of this Court.

It is ordered that the Clerk of this Court forthwith pay to the Treasury of the United States for the Fund for the Relief of Sick, Disabled and Destitute Seamen, in the case of *In re Lydoff*, the sum of \$944.65, and, in the case of *In re John W. Strong*, the sum of \$1,292.27.

In view of that disposition of the case the Court sees no point to allowing to any litigant in this case any costs, because all of the funds available to pay costs have by this order been exhausted and there are no further funds in the Court's registry from which to pay costs, so it is the order of the Court that each one of the litigants in each case pay his own costs, neither recover any costs against the other.

In the District Court of the United States
for the Western District of Washington
Northern Division

Ray W. England, <div style="text-align: center;">vs.</div> United States of America,	Libellant, Respondent.	}	No. 16347. Before Judge Bowen. Monday, Nov. 24, 1958.
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COURT'S ORAL OPINION

THE COURT: From a preponderance of the evidence in this case the Court finds, concludes and decides as follows:

That the libellant in this case is a very intellectually bright and keen minded man, and is in possession of all of his normal faculties so far as attending to his own business and being legally responsible for his own voluntarily entered upon contracts are concerned, just like any other honest citizen is or should be.

That he signed these shipping articles calling for service on board this ship, one of America's modern merchant ships, which contemplated going and did go into oriental waters where the temperature is rather unpleasantly high, it being very warm from the point of view of some person living in a more temperate zone like Seattle.

That after he got there or in that vicinity he got some foreign particle in his ear,—he called it a chip of

rust—, received in the course of his seaman's work, and then he says, and the Court has no other information from which to believe differently and the Court does believe, that he contracted an inflammation in his outer ear that needed medical attention.

That he did receive such medical attention and the ship furnished it and acted reasonably in the discharge of the shipowner's responsibility to provide medical attention, and the ship did provide reasonably competent medical attention in line with the usual conduct of this and other steamship lines.

That nevertheless the libelant was dissatisfied with that and his ear did not clear up, and the libelant absented himself from his duties on board the ship on the pretense that he continued to be unfit for duty, not only at the time the doctor certified that he was unfit for duty, but he continued later on to in effect assert that he was not fit for duty and took it upon himself to decide that question. But after deciding that he needed to be away from the vessel for reasons of his health, he did not do anything about treating his health for a substantially lengthy period, in one instance three days, when he might just as well have done so. There was no paucity of medical assistance available upon his own selection at Calcutta, the port where he was, and there was no reason why the shipowner could not provide further medical assistance at the place where he was if he had applied for it and in case the master reasonably thought he should have it.

That thereafter he also decided for himself without yielding to the master's authority in the matter to

leave the ship and to decide for himself that he had a right to break his shipping articles and return to the States. He did that against the consent and will of the master and shipowner and did on his own account by airplane fly back to the United States and Seattle where he sought some medical attention at the U. S. Public Health Service Hospital as an outpatient.

That in doing these things and in accomplishing the interruption of his service to the ship, the libelant did willfully and knowingly and designedly desert this ship and that he had no justification in fact or in law for doing so, and he is liable and his property is liable for the reasonable consequences of such desertion.

That, however, the Court believes under all the circumstances, particularly because at one time at least one doctor had said that he was in need of medical treatment and was at that time unfit for duty, and because the Court believes that his outer ear inflammation did not entirely get well, the Court feels that some mitigation of the damages should be allowed on account of such consideration, and the Court does find that it would be equitable and just in this admiralty action involving only the unpaid wages of a seaman who was logged as a deserter and whom the Court believes and does find that he was as he was logged, a deserter, should have relief from the full loss of his wages, and the Court finds, concludes and decides that a fair and just sum which should be deducted from the amount of the wages lawfully payable to him would be one-half of the unpaid wages, and that the balance of his withheld wages should

forthwith be paid to him, and the Court will settle and enter a proper order upon proper findings and conclusions ordering the Clerk to pay out of the registry of the Court one-half the sum held in this case for the account of this deserting seaman, and the other half should be turned over under the statute for the relief of disabled seamen.



No. 16086 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WONG KWAI SING, by his next friend WONG LUM SANG,
alias WONG DAI CHUNG,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State,

Appellee.

APPELLEE'S BRIEF.

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FILED

SEP 27 1958

PAUL P. O'BRIEN, CLERK



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No. 16086
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

WONG KWAI SING, by his next friend WONG LUM SANG,
alias WONG DAI CHUNG,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State,

Appellee.

APPELLEE'S BRIEF.

Jurisdiction of the Court.

This is an appeal from a judgment of the Court below entered in favor of defendant and against the plaintiff in an action for declaratory judgment of citizenship. Jurisdiction was invoked pursuant to the declaratory judgment statute, 28 U. S. C. 2201, and under the provisions of Section 503 of the Nationality Act of 1940, 54 Stat. 1171, 1172, 8 U. S. C. 903. This Court has jurisdiction of an appeal from that decision pursuant to 28 U. S. C. 1291.

Statute Involved.

8 U. S. C., Section 903:

Judicial proceedings for declaration of United States nationality in event of denial of rights and privileges as national; certificate of identity pending judgment.

If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the

applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided. (Oct. 14, 1940, ch. 876, Title I, subch. V, Sec. 503, 54 Stat. 1171.)

Statement of the Case.

The issues presented to the trial court were two in number. The first was whether or not Wong Lum Sang alias Wong Dai Chung, alleged father of the plaintiff, is a native-born citizen of the United States. The second was whether or not the plaintiff, Wong Kwai Sing, is the blood son of said Wong Lum Sang, alias Wong Dai Chung.

The appellant claims that Wong Lum Sang was born in Honolulu, T. H., and thus was a native-born citizen of the United States. He also claims that he was born to said Wong Lum Sang and Lee Shee on May 15, 1921 in China. Appellant was refused a United States passport and filed this action for declaratory judgment of citizenship in the District Court. He was issued a certificate of identity under Section 503 of the Nationality Act of 1940, being Application No. 156, by the American Consul General in Hong Kong, China, September 10, 1951. He was admitted to the United States at San Francisco, California, on December 14, 1951 for the purpose of prosecuting this action in the courts of the United States.

At the trial below, the appellant presented himself, his alleged father, older brother, and sister-in-law as witnesses. Appellee presented no oral testimony, confining

itself to extensive cross-examination of appellant's witnesses. Three exhibits were admitted into evidence on behalf of the defendant-appellee. Two of these exhibits, marked A and B, are generally referred to as Immigration and Naturalization Service files, and the third exhibit C, is referred to as the passport file. Sixteen exhibits were admitted in evidence on behalf of appellant.

The District Court entered judgment in favor of the defendant-appellee, and the plaintiff appealed herein.

Summary of Argument.

I.

The findings of the trial judge should be binding unless clearly based on an obvious error of law or a serious mistake of fact.

II.

The evidence supports the trial court's finding that the testimony of Wong Lum Sang was not to be believed, and that there was no other believable evidence to prove the claim that said Wong Lum Sang was born in the Territory of Hawaii or in any other territory or state of the United States.

III.

The evidence supports the trial court's findings that the testimony of plaintiff Wong Kwai Sing was not to be believed and that there was no other believable evidence to prove the claim that said Wong Kwai Sing is the blood son of Wong Lum Sang.

ARGUMENT.

I.

Findings of the Trial Judge Should Be Binding Unless Clearly Based on an Obvious Error of Law or a Serious Mistake of Fact.

It is a well recognized principle that a trial judge's findings of fact are never to be lightly disturbed by a reviewing Court. Generally, appellate courts will not overturn findings of fact of the trial judge, since he has had an opportunity of hearing and observing the witnesses. This principle applies with striking appropriateness to the trial in the court below. Though the defendant-appellee presented no witnesses, it conducted an extensive cross-examination of all witnesses presented by plaintiff-appellant. The Court had the singular advantage of observing the demeanor of all witnesses and noting the important respects in which their testimony broke down when subjected to the scrutiny of cross-examination.

The findings of the trial judge must be given great weight and should be binding, unless clearly based on an obvious error of law or a serious mistake or misconception of a fact.

United States v. Rutherford, No. 15,979 (9th Cir., July 11, 1958);

Standard Oil Co. v. Shipowners' & Merchants' Tugboat Co., 17 F. 2d 366 (9th Cir.);

National Surety Co. v. Globe Grain & Milling Co., 256 Fed. 601 (9th Cir.);

Woodbury et al. v. City of Shawneetown, 74 Fed. 205 (7th Cir.);

Fidelity & Casualty Co. of New York v. Phelps et ux., 64 F. 2d 233 (4th Cir.).

II.

The Testimony of Wong Lum Sang Was Not to Be Believed, and There Was No Other Believable Evidence to Prove That He Was Born in the Territory of Hawaii, or in Any Other Territory or State of the United States.

Plaintiff Wong Kwai Sing claimed citizenship as a son of a native-born United States citizen. In order for plaintiff to prevail, he must have proved by a preponderance of evidence that, at the time of his birth, his alleged father Wong Lum Sang was a citizen of the United States by birth or naturalization.

Louie Hoy Gay v. Dulles, 248 F. 2d 421 (9th Cir., 1957).

As no claim of naturalization was made, plaintiff was required to prove by a preponderance of evidence that Wong Lum Sang was born within the United States or its territories.

The only evidence offered by plaintiff on this issue was (1) a statement of Wong Lum Sang himself that he was born in Honolulu, and (2) a Certificate of Identity issued by Immigration officials, and a Passport issued by the Department of State on the basis of said Certificate of Identity.

Considering first the documentary evidence, there is no evidence that any substantial investigation preceded the issuance of Certificate of Identity. There was no investigation conducted by the State Department pursuant to the issuance of the Passport. It was issued strictly upon the basis of the Certificate of Identity.

Evidence shows that the Certificate of Identity was issued to Wong Lum Sang merely upon his own statement

that he was born in Honolulu, Hawaii, of Lum Shee, mother, and Wong Ah Fong, father. There is no evidence whatsoever to substantiate his claim to said parentage and birth. There is no birth certificate, and no listing or use of his name or identity in documents of any form. The first record of existence of a person named Wong Lum Sang was in 1923 when he sought admission to Honolulu. Moreover, there is no credible evidence showing any association between his alleged mother, Lum Shee, and Wong Ah Fong—not to mention a valid marriage. Even the statements by two other persons substantiating his claim to identity are of extremely doubtful value. They were made by affidavit at the time he made his own claim. One was by a “distant uncle,” and the other, by another person unknown, and both were later able to give little or no information about either Wong Lum Sang himself or his family.

The so-called “documentary” evidence which is alleged to support this claim of parentage and birth consists of no more than the record of death in Honolulu of said Wong Ah Fong, and the departure records from Honolulu to the Chinese mainland aboard the steamer “DORIC” of a woman named Lum Shee and an unnamed child. These documents have no probative value as to the issue of whether he was actually the son of those alleged persons, or even whether he was the unidentified child listed on the departure records of the steamer “DORIC”.

The damaging truth is that other evidence points directly to the contrary. For example, as set forth in Wong Lum Sang’s Immigration and Naturalization file, seven other persons also entered Honolulu from the Chinese mainland claiming to be of the exact maternal parentage as Wong Lum Sang claimed, and also claimed to be that

exact child carried by said person Lum Shee which Wong Lum Sang also claimed to be. Wong Lum Sang, of course, claimed to be the only child of this parentage. It is also interesting to note that the records show three other persons who claimed to be sons of Wong Ah Fong, though these three did not claim the same mother as Wong Lum Sang and the other seven.

Certificates of Identity are not binding on the courts, nor need the courts even accept or believe their *prima facie* representations or evidentiary foundation. They merely constitute the *prima facie* right of the holder to remain in the United States. They do not prove, as in this case, that the holder was a citizen of the United States or even born in the place listed.

Louie Hoy Gay v. Dulles, 248 F. 2d 421 (9th Cir., 1957).

Decisions by Immigration officials are not *res judicata*.

Pearson v. Williams, 202 U. S. 281;

Mock Kee Song v. Cahill, 94 F. 2d 975 (9th Cir., 1938).

An alien cannot rely upon permissive entry to estop the United States in subsequent action against him when said permissive entry was gained by misrepresentation or concealment.

Landon v. Clarke, 239 F. 2d 631 (1st Cir., 1936);

United States ex rel. Jankowski v. Shaughnessey
186 F. 2d 480 (2d Cir., 1951).

Clearly plaintiff completely failed to prove by a preponderance of evidence that at the time of his birth or at any time, his alleged father was a citizen of the United States.

III.

The Testimony of Plaintiff Wong Kwai Sing Was Not to Be Believed, and There Was No Other Believable Evidence to Prove the Claim That Said Wong Kwai Sing Is the Blood Son of Wong Lum Sang.

Assuming that plaintiff could have proved that his alleged father, Wong Lum Sang, was a citizen of the United States, he still must have proved by a preponderance of evidence that he is the blood son of said alleged father. He should have been able to prove that a valid marriage existed between his alleged parents, that a child was born of this marriage, and that he is that child as demonstrated by continuing association between himself and his parents either through personal contact or by correspondence if they were separated. He showed none of these elements.

The evidence offered on the issue is full of discrepancies. The record contains scores of contradictions among testimonies of the various witnesses, and is filled with one incredible explanation after another—none worthy of belief.

The government would not seriously contend that plaintiff is not either from Bon Mee Yuen village or at least is familiar with the village and some of its citizenry. However, the evidence introduced at the trial below, instead of proving that he is the blood son of Wong Lum Sang, indicates strongly that he is not. Testimony as to the father's dealings with these alleged sons while they were in China is not only filled with contradictions by different witnesses and by the same witnesses themselves, but is questionable to the point of complete unbelievability.

The alleged father, Wong Lum Sang, testified that he never did write to his sons, nor did he even inquire in letters to his wife about the sons. He admitted that as late as 1937 he had sworn to Immigration officials that he had only three sons, and then testified that he did not know about the fourth son until this son was a mature man. The reason for this, he said, was that his wife on the advice of a fortune teller had not informed him that he had a fourth son. It should be noted that in his previous statements as indicated in the files, he alleged that his wife did not inform him of the existence of this alleged fourth son because the boy was sickly as a child and she feared he would die.

Plaintiff Wong Kwai Sing testified that he had in fact written to his father and had received letters from his father, and that the other sons had written and received letters from their father also. He said he had been writing to his father since he was five years old. Plaintiff, having listened to Wong Lum Sang's previous cross-examination may have altered his story to make the circumstances appear more credible. However, if all those letters were being sent back and forth, it would be utterly absurd to believe that the father would not know of the existence of his fourth son, or that he would not have preserved the only tangible link with and evidence of his family in China. The whole pattern of behavior is completely outside the realm of believability, no matter which story the Court believed.

The incredibility of the claimed dealings between the father and his alleged son is pointed up by the testimony regarding photographs. When Wong Lum Sang was pressed for an explanation as to how he recognized Wong Kwai Sing as his blood son when he visited China in 1948

after not seeing said plaintiff since 1923 when Sing was two years old, he stated that he had seen photographs of the boy. After being ordered by the Court to bring any such photographs into court, he produced, after a one-day recess, four photographs alleged to be of Wong Kwai Sing. He stated that these were sent to him by his wife, Lee Shee, but he could not remember when. Wong Kwai Sing in his cross-examination testified that these pictures were taken within approximately a year-and-a-half of each other, two of them when he was about 26 years old and the other when he was about 25 or 26 years old. He stated that these were the only pictures taken of him, that they were taken at a market about one-half hour away from the village, that he always went alone to have the pictures taken, but they were paid for by his mother. He stated that none of his alleged brothers ever went with him to the photographer nor did he ever go with them to have their pictures taken. Although his alleged father had stated that he never had asked for a picture, he stated that his alleged father had in fact asked for a picture of him. However, the same alleged father had never asked for pictures of any of the other boys. When asked whether he was the favorite son of Wong Lum Sang, he stated "no", that his father regarded them all the same. The only other picture which he admitted had ever been taken was a group picture which was alleged to have been taken after the father returned to the village for a visit in 1948. This picture is supposed to be a group including the father, mother, and No. 1, 3 and 4 sons.

Though the Court were to believe only the conflicting stories most favorable to the plaintiff, those versions themselves would show a pattern of behavior among the alleged father and sons completely incompatible with that

of a real Chinese family—specifically, the father and his sons.

Another unbelievable facet of plaintiff's testimony which was not helped by testimony of the other witnesses was his complete lack of knowledge of his paternal grandmother's family and background. This is even more striking when one considers that he testified that he lived with his grandmother. He went so far as to state on the witness stand that his grandmother not only had not told him of her family, but had not even told him of any stories of her youth.

There are other confusions and discrepancies in the testimony such as the plaintiff's assertion that he went to school 13 years in a 4- to 6-grade school, and that each of his brothers—all three of them—attended 9 years each; his failure to acknowledge knowing the sons of Wong Joe Kee, whose home he located as a neighbor to his home, his explanation being that "it is a big village." Another one was his inability to say what year he left the village, although he could remember that his father came in 1948 and that he left with his father, and although he could remember other things—even the location of the newest house in the village which he said was built 5 years before that. He became quite confused on cross-examination as to the time he spent in Hong Kong before his departure for the United States, although he seemed to remember other events which normally should be more obscure. His No. 2 brother, Wong Kai Yuen, did not agree with his own wife as to how long they spent in Hong Kong after they were married before they paid their visit to Bon Mee Yuen village. He stated six months once, five months another time—in other words five or six months—and his wife stated less than a month. The wife, Lee

Pui Yn also stated that she never heard of her husband's paternal grandparents.

Plaintiff submitted in evidence receipts for remittances sent by his alleged father to his alleged mother in the village which were addressed "to the mother of Wong Kwai Sing". The first inference to be drawn from this unusual designation is that the mother of Wong Kwai Sing and the wife of Wong Lum Sang were not one and the same person. When asked about this matter, Wong Lum Sang asserted that he had designated the payee as the mother of his No. 3 son rather than the mother of his eldest son, as would be customary, because his eldest son was working away, although the testimony and records indicate that the eldest son never left the village.

Conclusion.

Everything considered, the evidence submitted to the Court below shows no facts which would prove citizenship, but a fabricated story which breaks down in important respects when subjected to the scrutiny of cross-examination. Nor are the exhibits offered by appellant probative to the issue of his claimed citizenship.

Therefore, the Court did not err in its findings, and the Judgment should be sustained.

Respectfully submitted,

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No. 16092 ✓

United States
Court of Appeals
for the Ninth Circuit

STEVEN VOLOUDAKIS and KATHERINE
VOLOUDAKIS, Petitioners,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax
Court of the United States

FILED
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PAUL P. O'BRIEN, CLERK

No. 16092

United States
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The Tax Court of the United States

No. 62444

STEVEN VOLOUDAKIS and KATHERINE
VOLOUDAKIS, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioners hereby petition for a redetermination of the deficiencies set forth by the Commissioner of Internal Revenue in his notice of deficiency (A:R: 90D:ENH:lk) dated February 21, 1956, and as a basis for their proceedings allege as follows:

1. The petitioners are individuals, husband and wife, residing at 1711 N. Skidmore Street, Portland, Oregon. The returns for the periods here involved were filed with the Collector or District Director for the District of Oregon.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioners on February 21, 1956.

3. The deficiencies as determined by the Commissioner are in income taxes and penalties for the below-indicated calendar years in the below-specified amounts:

Year	Deficiency	Sec. 291(a) Penalty	Sec. 294(d) (1) Penalty	Sec. 294(d) (2) Penalty
1949	\$ 1,868.66	\$ 467.16	\$ 4.00	\$ 145.95
1950	3,241.66	—0—	387.47	258.31
1951	3,635.80	—0—	52.50	261.78
1952	4,093.68	1,023.44	75.00	254.63
1953	5,899.84	—0—	97.50	397.64
	<hr/>	<hr/>	<hr/>	<hr/>
Totals	\$18,739.64	\$1,490.60	\$616.47	\$1,318.31

Substantially all of the above deficiencies and penalties are in dispute.

4. The determination of taxes and penalties set forth in the said notice of deficiency is based upon the following errors:

(a) The capital gain reported by petitioners through the partnership, Stevens Cleaners & Hatters, for the subject years was capital gain as reported by petitioners and was not ordinary income as asserted by the Commissioner.

(b) For the calendar year 1953, the \$3,900.00 received from the corporation, Stevens Cleaners, Inc., was not received as wages but was paid as repayment of a loss or debt.

(c) The penalties are in error to the extent that the amount thereof is dependent upon the deficiencies erroneously asserted by the Commissioner. Also all of the penalties should not be asserted for any one year.

5. The facts upon which the petitioners rely as the basis of this proceeding are as follows:

(a) The amounts reported by the petitioners as

capital gain (erroneously asserted to be ordinary income by the Commissioner) were received under and pursuant to an agreement dated April 8, 1947 by and between Sweeney Investment Company, petitioners, and the Pacific Telephone and Telegraph Company. Sweeney Investment Company (referred to in the agreement as Sweeney) was the owner of certain premises leased to petitioners under a lease agreement dated March 5, 1946. In the agreement of April 8, 1947, petitioners are referred to as the lessors and under said agreement they grant to the Pacific Telephone and Telegraph Company, as lessee, all rights petitioners had in the premises.

(b) By granting under said agreement of April 8, 1947 all rights they had in the premises, being their leasehold interest under the March 5, 1946 lease, petitioners in effect assigned all of their right, title and interest in the March 5, 1946 lease. Such lease was a capital asset and was held by petitioners for more than six months. The amounts received by petitioners under the April 8, 1947 agreement were received in consideration for such sale or assignment of a capital asset (the March 5, 1946 lease), so such amounts are entitled to be reported by petitioners as long term capital gain. It is immaterial that petitioners were referred to in the April 8, 1947 agreement as lessors, and the fact that other portions of the agreement are expressed in terms of a lease. The realities of the situation control. Under the agreement petitioners gave up all of the rights

in their leasehold. Such surrender of rights constituted a sale or assignment for tax purposes.

(c) The \$3,900.00 received by petitioner, Steven Voloudakis, for the calendar year 1953, was erroneously reported on the books of the corporation as compensation. At the time of such payments, the corporation was indebted to Steven Voloudakis in amounts in excess of \$3,900.00. The payments comprising the \$3,900.00 should have been applied against reduction of such loans and should not have been treated as compensation to Steven Voloudakis.

(d) Since the contention of petitioners set forth in subparagraph (c) of Paragraph 4 above are dependent upon questions of law, no statement of facts is required in regard thereto.

Wherefore, the petitioners pray that this Court may hear the proceeding and determine that there is no deficiency in income tax or penalties for the calendar years 1949, 1950, 1951, 1952 or 1953, and give such other and further relief as in the premises the Court may deem fit and proper.

/s/ WILLIAM H. KINSEY.

Duly Verified.

EXHIBIT "A"

Letterhead of
U. S. Treasury Department
Internal Revenue Service
District Director
830 N. E. Holladay Street
Portland 14, Oregon

February 21, 1956

In replying refer to:

A:R: 90D:ENH:lk

Mr. Steven Voloudakis and
Mrs. Katherine Voloudakis
Husband and Wife
1711 N. Skidmore Street
Portland, Oregon

Dear Mr. and Mrs. Voloudakis:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1949, December 31, 1950, December 31, 1951, December 31, 1952 and December 31, 1953, disclosed deficiencies in tax aggregating \$18,739.64, and penalties aggregating \$3,425.38, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days, you may not

Exhibit "A"—(Continued)

exclude any day unless the 90th day is a Saturday, Sunday or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to District Director of Internal Revenue, Chief, Audit Division, 830 N.E. Holladay Street, Portland 14, Oregon. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Yours very truly,

RUSSELL C. HARRINGTON,
Commissioner,

/s/ By R. C. GRANQUIST,
District Director.

Enclosures: Statement, Form 160, Agreement Form.
1230-A.

A:R:90D:ENH:lk

STATEMENT

Mr. Steven Voloudakis and Mrs. Katherine Voloudakis, Husband and Wife, 1711 N. Skidmore Street. Portland. Oregon.

Income tax liability for the taxable years ended December 31, 1949, December 31, 1950, December 31, 1951, December 31, 1952 and December 31, 1953.

Exhibit "A"—(Continued)

Year	Deficiency	Sec. 291(a) Penalty	Sec. 294(d) (1) Penalty	Sec. 294(d) (2) Penalty
1949	\$ 1,868.66	\$ 467.16	\$ 4.00	\$ 145.95
1950	3,241.66	—0—	387.47	258.31
1951	3,635.80	—0—	52.50	261.78
1952	4,093.68	1,023.44	75.00	254.63
1953	5,899.84	—0—	97.50	397.64
Totals	\$18,739.64	\$1,490.60	\$616.47	\$1,318.31

In making this determination of your income tax liability, careful consideration has been given to the report of examination attached to the letter dated January 6, 1956.

Inasmuch as your returns for the years 1949 and 1952 were not filed within the time prescribed by law, the twenty-five per cent of the tax has been added thereto in the respective amounts of \$467.16 and \$1,023.44 in accordance with the provisions of section 291(a) of the Internal Revenue Code.

Inasmuch as you failed to make and file a declaration of estimated tax for the year 1950 and the failure to pay the installments due on the declaration of estimated tax filed for the years 1949, 1951, 1952 and 1953 within the time prescribed by law, the five, six and ten per cent penalties have been asserted in accordance with the provisions of section 294(d)(1) of the Internal Revenue Code.

The six per cent penalty for the substantial underestimation of estimated tax has been asserted in accordance with the provisions of section 294(d)(2) of the Internal Revenue Code.

Taxable year ended December 31, 1949

Adjustments to Income

Net income as disclosed by return	\$ 6,097.72
Unallowable deductions and additional income:	
(a) Partnership income	17,505.54
Total	\$23,603.26
Nontaxable income and additional deductions:	
(b) Capital gain	\$8,392.60
(c) Standard deduction	322.47 8,715.07
Net income as adjusted	\$14,888.19

Exhibit "A"—(Continued)

Explanation of Adjustments

(a) It has been determined that your share of the ordinary income from Stevens Cleaners & Hatters for 1949 is \$15,888.19
 Your return reported a loss from the partnership of .. 1,617.35

 Your taxable income is increased in the sum of \$17,505.54

(b) It has been determined that you had no capital gain through the partnership of Stevens Cleaners & Hatters for 1949 and since your return reported a capital gain of \$8,392.60 from this source your taxable income is reduced in such amount.

(c) You are entitled to a standard deduction of \$1,000.00 in accordance with the provisions of section 23(aa) of the Internal Revenue Code and since your return reported a standard deduction of \$677.53 you are entitled to the difference of \$322.47 and your taxable income is reduced accordingly.

Computation of Tax

Net income as adjusted	\$14,888.19
Less: Exemption—4 x \$600.00	2,400.00
<hr/>	
Income subject to tax	\$12,488.19
Income tax liability	\$2,482.48
Income tax liability disclosed by return	613.82
<hr/>	
Deficiency of income tax	\$1,868.66

Penalty Computation

Penalty under sec. 291(a) 25% of \$1,868.66 467.16
 Penalty for failure to pay your installments on your estimated tax of \$100.00 is computed as follows:

Amount due	Due Date	Installment	Date Paid	Rate	Penalty
\$ 25.00	3/15/49	3/ 4/49	—0—	\$—0—	
25.00	6/15/49	6/ 2/49	—0—	—0—	
25.00	9/15/49	3/15/54	10%	2.50	
25.00	1/15/50	3/15/50	6%	1.50	

\$100.00	Total penalty under sec. 294(d) (1) (B)	\$ 4.00
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Exhibit "A"—(Continued)

Total tax liability as above	\$2,482.48	
Less actually paid on estimated tax	50.00	
		<hr/>
Balance	\$2,432.48	
Penalty under sec. 294(d)(2) I.R.C.		
6% of \$2,432.48		\$145.95

Taxable year ended December 31, 1950

Adjustments to Income

Net income as disclosed by return	\$ 8,235.46	
Unallowable deductions and additional income:		
(a) Partnership income	23,505.54	
		<hr/>
Total	\$31,741.00	
Nontaxable income and additional deductions:		
(b) Capital gain	\$10,767.86	
(c) Standard deduction	84.95	10,852.81
		<hr/>
Net income as adjusted	\$20,888.19	

Explanation of Adjustments

(a) It has been determined that your share of the ordinary income from Stevens Cleaners & Hatters for 1950 is	\$21,888.19
Your return reported a loss from the partnership of....	1,617.35
	<hr/>
Your taxable income is increased in the sum of	\$23,505.54

(b) It has been determined that you had no capital gain through the partnership of Stevens Cleaners & Hatters for 1950 and since your return reported a capital gain of \$10,767.86 from this source your taxable income is reduced in such amount.

(c) You are entitled to a standard deduction of \$1,000.00 in accordance with the provisions of section 23(aa) of the Internal Revenue Code and since your return reported a standard deduction of \$915.05 your reported income is reduced by the difference of \$84.95.

Computation of Tax

Net income as adjusted	\$20,888.19
Less: Exemption—4 x \$600.00	2,400.00
	<hr/>
Income subject to tax	\$18,488.19

Exhibit "A"—(Continued)

Income tax liability	\$4,305.12
Income tax liability disclosed by return	1.063.46
	<hr/>
Deficiency of income tax	\$3,241.66

Penalty Computation

Penalty for failure to file a Declaration of Estimated tax under section 291(d)(1)(A) computed as follows:

Amount due	Installment			
	Due Date	Date Paid	Rate	Penalty
\$1,076.28	3/15/50	3/15/51	10%	\$107.63
1,076.28	6/15/50	3/15/51	10%	107.63
1,076.28	9/15/50	3/15/51	10%	107.63
1,076.28	1/15/51	3/15/51	6%	64.58
<hr/>				
\$4,305.12	Total penalty under sec. 294(d) (1) (A)			\$387.47
Penalty under sec. 294(d) (2) I.R.C.				
6% of \$4,305.12				\$258.31

Taxable year ended December 31, 1951

Adjustments to Income

Net income as disclosed by return	\$ 3,235.47
Unallowable deductions and additional income:	
(a) Partnership income	23,505.54
	<hr/>
Total	\$31,741.01
Nontaxable income and additional deductions:	
(b) Capital gain	\$10,767.77
(c) Standard deduction	84.95 10,852.82
	<hr/>
Net income as adjusted	\$20,888.19

Explanation of Adjustments

(a) It has been determined that your share of the ordinary income from Stevens Cleaners & Hatters for 1951 is	\$21,888.19
Your return reported a loss from the partnership of	1,617.35
	<hr/>
Your taxable income is increased in the sum of	\$23,505.54

(b) It has been determined that you had no capital gain through the partnership of Stevens Cleaners & Hatters for 1951

Exhibit "A"—(Continued)

and since your return reported a capital gain of \$10,767.87 from this source your taxable income is reduced in such amount.

(c) You are entitled to a standard deduction of \$1,000.00 in accordance with the provisions of section 23(aa) of the Internal Revenue Code and since your return reported a standard deduction of \$915.05 your reported income is reduced by the difference of \$84.95.

Computation of Tax

Net income as adjusted	\$20,888.19
Less: Exemption—4 x \$600.00	2,400.00
<hr/>	
Income subject to tax	\$18,488.19
Income tax liability	\$4,862.94
Income tax liability disclosed by return	1,227.14
<hr/>	
Deficiency of income tax	\$3,635.80

Penalty Computation

Penalty for failure to pay installments on your estimated tax of \$1,000.00 is computed as follows:

Amount Installment

due	Due Date	Date Paid	Rate	Penalty
\$ 250.00	3/15/51	3/15/51	—0—	\$—0—
250.00	6/15/51	6/18/51	5%	12.50
250.00	9/15/51	3/15/52	10%	25.00
250.00	1/15/52	3/15/52	6%	15.00

\$1,000.00	Total penalty under sec. 294 (d) (1) (B)	\$ 52.50
Total tax liability as above	\$4,862.94	
Less Actually paid on estimate	500.00	
<hr/>		
Balance	\$4,362.94	
Penalty under sec. 294(d) (2) I.R.C.		
6% of \$4,362.94		\$261.78

Taxable year ended December 31, 1952

Adjustments to Income

Net income as disclosed by return	\$ 8,278.33
Unallowable deductions and additional income:	
(a) Partnership income	23,505.54
(b) Rents	231.95
<hr/>	
Total	\$32,015.82

Exhibit "A"—(Continued)

Nontaxable income and additional deductions:

(c) Capital gain	\$10,767.87	
(d) Standard deduction	80.19	10,848.06
		<hr/>
Net income as adjusted		\$21,167.76

Explanation of Adjustments

(a) It has been determined that your share of the ordinary income from Stevens Cleaners & Hatters for 1952 is	\$21,888.19
Your return reported a loss from the partnership of	1,617.35
	<hr/>
Your taxable income is increased in the sum of	\$23,505.54

(b) It has been determined that depreciation on rental property does not exceed \$184.72 for period 6/1/52 to 12/31/52, based on a thirty year life and a cost of building of \$9,500.00. Since you claimed a deduction of \$416.67, the reported net income is increased by the difference of \$231.95, in the amounts shown.

(c) It has been determined that you had no capital gain through the partnership of Stevens Cleaners & Hatters for 1952 and since your return reported a capital gain of \$10,767.87 from this source, your taxable income is reduced in such amount.

(d) You are entitled to a standard deduction of \$1,000.00 in accordance with section 23(aa) of the Internal Revenue Code and since your return reported a deduction of \$919.81 your taxable income is reduced \$80.19 as above.

Computation of Tax

Net income as adjusted	\$21,167.76
Less: Exemption—4 x \$600.00	2,400.00
	<hr/>
Income subject to tax	\$18,767.76
Income tax liability	\$5,443.74
Income tax liability disclosed by return	1,350.06
	<hr/>
Deficiency of income tax	\$4,093.68

Exhibit "A"—(Continued)

Penalty Computation

Penalty under sec 291(a) I.R.C.

25% of \$4,093.68 \$1,023.44

Total tax liability as above \$5,443.74

Less paid on estimated tax 1,200.00

Balance \$4,243.74

Penalty under sec. 294(d) (2) I.R.C.

6% of \$4,243.74 \$ 254.63

Penalty for failure to pay installments on your
estimated tax of \$1,200.00 is computed as
follows:

Amount Installment

due	Due Date	Date Paid	Rate	Penalty
\$ 300.00	3/15/53	3/17/52	5%	\$15.00
300.00	6/15/52	7/10/52	5%	15.00
300.00	9/15/52	1/19/53	10%	30.00
300.00	1/15/53	1/19/53	5%	15.00

\$1,200.00	Total penalty under sec. 294(d) (1) (B)	\$75.00
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Taxable year ended December 31, 1953

Adjustments to Income

Net income as disclosed by return \$ 8,283.28

Unallowable deductions and additional income:

(a) Wages 3,900.00

(b) Rents 799.94

(c) Partnership income 23,505.78

Total \$36,489.00

Nontaxable income and additional deductions:

(d) Capital gain \$10,821.00

(e) Standard deduction 79.63 10,900.63

Net income as adjusted \$25,588.37

Explanation of Adjustments

(a) It has been determined that you received wages in the amount of \$3,900.00 from the corporation, Stevens Cleaners, Inc. during the taxable year which was not reported in your

Exhibit "A"—(Continued)

return. The corporation withheld a tax of \$248.80 on these wages and you have been given credit for this amount. Your taxable income is increased accordingly.

(b) It has been determined that income from rental properties of \$799.94 was not reported in the return and your taxable income is increased in this amount.

(c) It has been determined that your share of the ordinary income from partnership, Stevens

Cleaners & Hatters for 1953 is \$21,888.43

Your return reported a loss from the partnership of 1,617.35

Your taxable income is increased in the sum of \$23,505.78

(d) It has been determined that you had no capital gain through the partnership of Stevens Cleaners & Hatters for 1953 and since your return reported a capital gain of \$10,821.00 from this source, your taxable income is reduced in such amount.

(e) You are entitled to a standard deduction of \$1,000.00 in accordance with section 23(aa) of the Internal Revenue Code and since your return reported a deduction of \$920.37 your taxable income is reduced \$79.63 as above.

Computation of Tax

Net income as adjusted \$25,588.37

Less: Exemption—4 x \$600.00 2,400.00

Income subject to tax \$23,188.37

Income tax liability \$7,251.12

Income tax liability disclosed by return .. 1,351.28

Deficiency of income tax \$5,899.84

Computation of Additional Tax Due

Shown On

	Return	As Corrected
Total income tax liability	\$1,351.28	\$7,251.12
Less: Income tax withheld		\$248.80
Payments on estimated tax	\$375.00	\$375.00
Previous assessments	976.28	976.28
Additional tax due	—0—	\$5,651.00

Exhibit "A"—(Continued)

Penalty Computation

Penalty for failure to pay installments on your estimated tax of \$1,500.00 is computed as follows:

Amount due	Installment Due Date	Date Paid	Rate	Penalty
\$ 375.00	3/15/53	3/15/53	—0—	\$—0—
375.00	6/15/53	3/15/54	10%	37.50
375.00	9/15/53	3/15/54	10%	37.50
375.00	1/15/54	3/15/54	6%	22.50
<hr/>				
\$1,500.00	Total penalty under sec. 294(d) (1) (B) I.R.C.			\$97.50
Total tax liability as above				\$7,251.12
Less:				
Withholding tax actually withheld \$248.80				
Estimated tax paid				375.00 623.80
				<hr/>
Balance				\$6,627.32
Penalty under sec. 294(d) (2) I.R.C.				
6% of \$6,627.32				\$397.64

Served and Entered May 23, 1956.

[Endorsed]: T.C.U.S. Filed May 21, 1956.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, by his attorney, John Potts Barnes, Chief Counsel, Internal Revenue Service, and for answer to the petition filed herein, admits and denies as follows:

1. Admits the allegations set forth in paragraph 1 of the petition.

2. Admits the allegations set forth in paragraph 2 of the petition.

3. Admits the allegations set forth in paragraph 3 of the petition.

4 (a) to (c), inclusive. Denies that the respondent erred as alleged in paragraph 4(a) to (c), inclusive, of the petition.

5 (a). Admits that the amounts reported by the petitioners were received pursuant to an agreement dated April 8, 1947; that the subject property was leased by Sweeney Investment Company to petitioners under a lease agreement dated March 5, 1956; and that petitioners are referred to as the lessors in the agreement of April 8, 1947. Denies the remaining allegations set forth in paragraph 5(a) of the petition.

(b) to (d), inclusive. Denies the allegations set forth in paragraph 5(b) to (d), inclusive, of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the relief sought in the petition be denied, and that the deficiencies in income tax and additions to tax, as set forth in the notice of deficiency, be in all respects approved.

/s/ JOHN POTTS BARNES, JHP,
Chief Counsel, Internal
Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel,
John H. Pigg, Assistant Regional Counsel,
John D. Picco, Special Attorney, Internal Revenue Service.

Served and Entered July 13, 1956.

[Endorsed]: T.C.U.S. Filed July 11, 1956.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties above named, and acting by and through their respective counsel of record, as follows:

1. The petitioners are Steven and Katherine Voloudakis, husband and wife, residing at 1711 N. Skidmore Street, Portland, Oregon. Petitioners filed joint income tax returns with the then Collector or Director for the District of Oregon for the taxable years 1949 to 1953, inclusive.

2. During the taxable years the petitioners comprised a partnership, d/b/a Stevens Cleaners and Hatters. The principal source of partnership income was derived from amounts received from Pacific Telephone and Telegraph Company. The petitioner Steven Voloudakis also owned 99.6% of the outstanding stock of Stevens Cleaners, Inc., an Oregon corporation engaged in the dry cleaning and used clothing business.

3. Under date of March 5, 1946, petitioners leased a parcel of improved real estate in downtown

Portland situated on Lots 1 to 8, in the south half of Block K, City of Portland, also known as the Sweeny Block, for a term of ten years. The owner of this property was Sweeny Investment Company, of Spokane, Washington, hereafter referred to as Sweeny. A copy of the written lease executed by the parties on March 5, 1946, is attached hereto and made a part hereof as Exhibit 1-A.

4. The petitioners occupied the leased premises, made improvements and operated their dry cleaning business for approximately one year. In the meantime, the Pacific Telephone and Telegraph Company, hereinafter also referred to as Pacific, expressed a desire to occupy the premises. As a result of ensuing negotiations, Sweeny and the petitioners entered into an agreement with Pacific on April 8, 1947. Thereafter, Pacific occupied the premises in accordance with the terms of said agreement. Attached hereto and made a part hereof as Exhibit 2-B is a copy of the agreement dated April 8, 1947.

5. Petitioners reported the amounts received from Pacific, pursuant to the terms of the agreement dated April 8, 1947, on the partnership returns on the theory that the petitioners had sold their lease of March 5, 1946, to Pacific on the installment plan. The partnership returns reflected the following amounts received from Pacific, and the portion thereof included in income as long-term capital gains:

Year	Amount Received	Gains as Computed on Returns	Taken Into Account on Joint Return, 50% as long term Capital Gains
1949	\$21,200.04	\$16,785.21	\$ 8,392.60
1950	27,200.04	21,535.73	10,767.86
1951	27,200.04	21,535.73	10,767.87
1952	27,200.04	21,535.73	10,767.87
1953	27,200.04	21,641.99	10,821.00

6. The Commissioner of Internal Revenue found that the gross amounts reported as received each year from Pacific to be correct, but determined that these amounts represented rental income rather than proceeds of an installment sale of petitioners' leasehold. The Commissioner of Internal Revenue allowed amortization of certain leasehold improvements, and of certain commissions and legal fees, and determined the net rental income each year from Pacific to be as follows:

Year	Gross Rent Received	Allowable Amortization	Net Rent
1949	\$21,200.04	\$5,063.15	\$16,136.89
1950	27,200.04	5,063.15	22,136.89
1951	27,200.04	5,063.15	22,136.89
1952	27,200.04	5,063.15	22,136.89
1953	27,200.04	5,063.15	22,136.89

7. In 1953 the petitioner Steven Voloudakis received \$3,900.00 from Stevens Cleaners, Inc. This amount was entered on the corporate books for 1953 as compensation received by the petitioner for services rendered as president of the corporation and the salary deduction was taken on the corporation's return for that year.

8. The Commissioner of Internal Revenue deter-

mined that the petitioner, Steven Voloudakis, had received salary income in 1953 in the amount of \$3,900.00 from the corporation, Stevens Cleaners, Inc., no part of which was reported on petitioners' income tax return. Therefore, the Commissioner increased the reported net income by \$3,900.00. Petitioners objected to the inclusion of this amount in their income on the ground that the corporation was indebted to Steven Voloudakis in an amount in excess of \$3,900.00 in 1953 and that, therefore, the payments made by the corporation should have been applied to reduce the indebtedness.

9. Attached hereto and made a part hereof as exhibits are the following:

Description	Exhibit
Petitioners' income tax return for 1949	C
Petitioners' income tax return for 1950	D
Petitioners' income tax return for 1951	E
Petitioners' income tax return for 1952	F
Petitioners' income tax return for 1953	G
Partnership return for 1949	H
Partnership return for 1950	I
Partnership return for 1951	J
Partnership return for 1952	K
Partnership return for 1953	L
Corporate return for Stevens Cleaners, Inc. for 1953	M

10. All the exhibits herein mentioned shall be considered as having been offered and received in evidence in this case, unless objection is made thereto and the objection is sustained.

11. Each of the parties hereto reserves the right

to supplement the facts herein set forth with evidence at the trial.

/s/ WILLIAM H. KINSEY,
Counsel for Petitioners.

/s/ HERMAN T. REILING, JHP,
Acting Chief Counsel, Internal Revenue Service,
Counsel for Respondent.

[Endorsed]: T.C.U.S. Filed February 20, 1957.

29 T. C. No. 116

Tax Court of the United States

Steven Voloudakis and Katherine Voloudakis, Petitioners, v. Commissioner of Internal Revenue, Respondent.

Docket No. 62444. Filed March 12, 1958.

Held, amounts received by petitioners during the years in issue from Pacific Telephone & Telegraph Company, pursuant to the terms of a lease agreement executed April 8, 1947, constitute rental income taxable under section 22(a), I.R.C. 1939.

William H. Kinsey, Esq., and James R. Moore, Esq., for the petitioners.

John D. Picco, Esq., for the respondent.

FINDINGS OF FACT AND OPINION

Withey, Judge: The respondent determined deficiencies in the income tax of petitioners and additions to tax under section 291(a) and section 294

(d)(1)(A), (d)(1)(B) and (d)(2) of the Internal Revenue Code of 1939 for the indicated years as follows:

Year	Deficiency	Additions to tax			
		Sec. 291(a)	Sec. 294 (d) (1) (A)	Sec. 294 (d) (1) (B)	Sec. 294 (d) (2)
1949	\$1,868.66	\$ 467.16	\$ —	\$ 4.00	\$145.95
1950	3,241.66	—	387.47	—	258.31
1951	3,635.80	—	—	52.50	261.78
1952	4,093.68	1,023.44	—	75.00	254.63
1953	5,899.84	—	—	97.50	397.64

The issues presented for our decision are the correctness of the respondent's action in determining that (1) amounts received by petitioners from Pacific Telephone & Telegraph Company (hereinafter referred to as Pacific) during the years in issue constituted ordinary income taxable under section 22(a) of the 1939 Code; (2) petitioners are liable for additions to tax under section 291(a) for 1949 and 1952; and (3) petitioners are liable for additions to tax under section 294(d)(1)(A) for 1950, under section 294(d)(1)(B) for 1949, 1951, 1952 and 1953, and under section 294(d)(2) for each of the taxable years in issue.

An additional issue presented by the pleadings was abandoned by petitioners at the hearing.

General Findings of Fact

Some of the facts have been stipulated and are found accordingly.

Petitioners Steven Voloudakis and Katherine Voloudakis are husband and wife and residents of Portland, Oregon. Petitioners filed joint income tax

returns for the years 1949, 1950, 1951, 1952 and 1953 with the director of internal revenue for the district of Oregon.

Issue 1

Findings of Fact

During the years in issue, petitioners, as partners, owned a dry cleaning establishment doing business as Stevens Cleaners and Hatters. In addition, Steven Voloudakis (hereinafter referred to as petitioner or Voloudakis) also owned 99.6 per cent of the outstanding stock of Stevens Cleaners, Inc., an Oregon corporation engaged in the dry cleaning and used clothing business.

Prior to 1946, petitioner conducted his cleaning, dyeing and laundry operations at 1334 S. W. Morrison Street, Portland, Oregon, occupying approximately one-eighth of the premises known as the Sweeny Building or the Sweeny Block.

On March 5, 1946, petitioners executed a lease with the Sweeny Investment Company (hereinafter referred to as Sweeny), owner of the Sweeny Building, for the entire premises comprising the Sweeny Block, subject only to a prior lease to Robert Pantley of a portion of the premises. The lease to Robert Pantley had approximately 6 months to run.

The lease executed by Sweeny and petitioners was for a term of 10 years commencing with the surrender of the premises by all previous tenants except Robert Pantley. The rental provided in the lease was \$1,600 per month, payable on the first day of each calendar month. The lease contained

the standard provisions normally appearing in leases of business property concerning such matters as the maintenance and alteration of the premises, the liability of the lessee for negligence, destruction of the premises, insurance, assignment and subletting, etc. Petitioner occupied the entire premises pursuant to the foregoing lease of March 5, 1946, made certain improvements on the property and operated a cleaning establishment thereon for approximately one year.

Meanwhile, Pacific was attempting to locate available office space in the downtown Portland area, and retained Churchill Cook, a realtor, as its agent for this purpose. Churchill Cook contacted petitioner regarding the need of Pacific for additional space and negotiations for the entire Sweeny Block ensued. On January 17, 1947, Voloudakis signed and sent the following letter to Cook:

Reference is made to our current conversation relative to your procuring for me a sub-tenant who will sub-lease the entire premises known as the Sweeney Block, said premises being further described as the one story building situated on Lots numbered 1 to 8 inclusive in Block South half (S $\frac{1}{2}$) of K in Portland, Oregon, and on which premises I hold a lease expiring in May 1956.

In connection therewith, I agree to vacate and to sub-lease the entire premises in an "as is" condition for the full term of my lease at and for a gross rental at the rate of \$50,000 per year, which rental is to be paid in monthly installments of $\frac{1}{12}$ th

each month, beginning with the date that the premises are vacated by the undersigned, which will be sixty (60) days from the date of the execution of the lease.

It is further agreed that your prospective tenant at the time of executing said lease will deposit with me the sum of \$35,000.00, which deposit shall represent a partial payment of rent in the amount of \$1500.00 per month for the first 24 months of said lease. While an advance rental at the rate of \$1500.00 per month would equal the sum of \$36,000.00, the \$35,000 so paid represents this amount less \$1000.00 interest deducted therefrom for the usage of same. The balance of the rental due during the first 24 months shall be paid in monthly installments of \$2666.00.

I further agree to vacate 75% of the entire premises within sixty (60) days after the date of the execution of said lease and further agree that the remaining 25% of said premises will be vacated not later than July 30th, 1947.

This agreement shall be valid until February 28th, 1947 in order to permit you and your principals time to accomplish the necessary arrangements to conclude the sub-lease.

This agreement is predicated on the understanding that your principals have viewed the property, have expressed their interest in sub-leasing said premises and that the proposed sub-tenant is a national concern rated at better than One million dollars.

It is further understood and agreed that whereas the undersigned entered into a lease of the above mentioned property in March, 1946, with the Sweeney Investment Company, a corporation, and it is provided in said lease that the same shall not be sub-let or assigned without the written consent of the lessor, Sweeney Investment Company; that this agreement is made contingent upon getting such consent; and if the undersigned is not able to secure said consent, or if the lessor refuses to give its written consent, this entire agreement shall be null and void; and it is further understood and agreed that the parties to whom the undersigned sub-lets or assigns their rights in the lease to this property will, in occupying and using said property, comply with and assume the obligations of the undersigned regarding the occupancy and use of said property, as contained in said lease from the Sweeney Investment Company to undersigned.

The foregoing letter was drafted by Churchill Cook for the purpose of committing petitioners to an offer.

On April 7, 1947, the petitioners signed and sent the following letter to Pacific:

Reference is made to our lease agreement wherein you are leasing the entire one story building situated on Block (S 1½) "K" in Portland, Oregon.

In connection therewith and with specific attention to the advance rental in the amount of \$35,000, to be paid at the time of consummating this lease, please be advised this will authorize and request

you to pay directly to G. C. Cook the sum of \$10,500 from the advance rent to be paid me at that time, said payment to G. C. Cook being payment in full for his services in connection therewith.

This letter was also drafted by Churchill Cook.

Negotiations between the parties culminated on April 8, 1947, with the consent of Sweeny, the original lessor, as required by the lease executed March 5, 1946, and with the execution of a three-way agreement by Sweeny, Pacific and petitioners. The agreement, dated April 8, 1947, was for a term of 9 years (the remainder of the unexpired term under the lease of March 5, 1946) commencing with the surrender of 70 per cent of the premises. The rental to be paid by Pacific was \$50,000 per year, payable monthly at the rate of \$1,900 to Sweeny and \$2,266.67 to Voloudakis. The agreement describes petitioners as lessors and Pacific as lessee, and contains the following provisions:

Whereas, the Lessee desires to lease said premises;

Now, Therefore, for and in consideration of the covenants and agreements of the parties hereto as hereinafter set forth, it is hereby agreed as follows:

1. The Lessors hereby lease to the Lessee all of the property above described for a term of nine (9) years commencing on the date when possession of at least seventy per cent of said premises is delivered to the Lessee, which date shall be not later than May 1, 1947.

* * * * *

22. If the Lessee shall fail to pay any rent or other payments provided for in this lease, or if the Lessee shall default in the performance of any of its covenants in this lease, and if such default is not remedied within thirty (30) days after written notice thereof, Lessors without further notice or demand may enter upon and repossess the premises and expet [sic] the Lessee and those claiming under it and remove its effects without being deemed guilty of trespass and without prejudice to any remedies which may be used for arrears of rent or preceding breach of covenant.

* * * * *

In accordance with the provisions of the foregoing agreement the premises were vacated by petitioner and possession was taken by Pacific. The agreement expired by its terms on or about May 1, 1956.

Pacific negotiated a new lease directly with Sweeny for possession of the premises after May 1, 1956.

The payments made by Pacific to petitioner under the agreement of April 8, 1947, aggregated \$237,130.41. The amounts received by Voloudakis under the agreement of April 8, 1947, were reported by petitioners on their partnership returns as long-term capital gains resulting from an installment sale, with the following explanation of the transaction appended:

On April 8, 1947, taxpayer entered into an agreement with the Pacific Telephone and Telegraph

Company, whereby the company would purchase the taxpayer's interest in the property leased by the taxpayer from Sweeney Investment Co., Spokane, Washington. Taxpayer had previously entered into a lease on March 1, 1946 for a period of ten years with Sweeney Investment Co. for the property which was now made available to the Pacific Telephone and Telegraph Co., for a total price of \$237,-130.41 which payments are to be made by that company to the taxpayer from April 8, 1948 to March 6, 1956. This transaction constitutes a sale of the original lease with the profit being reported on the installment plan as less than 30% of the sales price was received during the initial year 1947.

The amounts reported by petitioners as payments received from Pacific during the years in issue were as follows:

Year	Amount Received	Gain as Computed on Returns	Taken Into Account on Joint Return, 50 per cent as long-term capital gains
1949	\$21,200.04	\$16,785.21	\$ 8,392.60
1950	27,200.04	21,535.73	10,767.86
1951	27,200.04	21,535.73	10,767.87
1952	27,200.04	21,535.73	10,767.87
1953	27,200.04	21,641.99	10,821.00

The Commissioner determined that the foregoing amounts represented rental income rather than proceeds of an installment sale of petitioners' leasehold, and allowed amortization of certain leasehold improvements and of commissions and legal fees. The respondent accordingly determined petitioners' net rental income for each of the years in issue to be as follows:

Year	Gross Rent Received	Allowable Amortization	Net Rent
1949	\$21,200.04	\$5,063.15	\$16,136.89
1950	27,200.04	5,063.15	22,136.89
1951	27,200.04	5,063.15	22,136.89
1952	27,200.04	5,063.15	22,136.89
1953	27,200.04	5,063.15	22,136.89

Opinion

The respondent has determined that the agreement executed by petitioners, Sweeny, and Pacific on April 8, 1947, created a sublease between petitioners and Pacific, and that the amounts received by Voloudakis from Pacific during the years in issue constitute rental payments taxable as ordinary income under section 22(a) of the 1939 Code.

Petitioners contend that the transaction resulted in a sale to Pacific of their leasehold interest in the premises known as the Sweeny Block and that the proceeds received pursuant thereto represent long-term capital gain.

In support of their position petitioners rely on our decisions in *Walter H. Sutliff*, 46 B.T.A. 446; *Isadore Golonsky*, 16 T.C. 1450, *affd.* 200 F.2d 72, *certiorari denied* 345 U.S. 939; *Louis W. Ray*, 18 T.C. 438, *affd.* 210 F.2d 390, *certiorari denied* 348 U.S. 829; *McCue Bros. & Drummond, Inc.*, 19 T.C. 667, *affd.* 210 F.2d 752, *certiorari denied* 348 U.S. 829.

In those cases we held that payments received by a lessee in return for the cancellation, surrender or sale by him of his leasehold interest are received for the relinquishment of a capital asset and may be reported as capital gain. In *Walter H. Sutliff*,

supra, the taxpayer as lessee joined with the owner in fee of the premises in a deed conveying the property to a purchaser. We there rejected the contention of the Commissioner that a portion of the consideration received by the taxpayer was a substitute for the rental payments which he might receive throughout the unexpired term of his lease, and held that he had disposed of his leasehold interest in the property and was entitled to report the proceeds as capital gain.

In *Isadore Golonsky, supra*, we held that an amount received by the lessee from the owner of the premises for the accelerated cancellation of a lease constituted capital gain since the tenant's right to the use and possession of the unexpired term was a property right which thereby was transferred by him to the lessor.

Louis W. Ray, supra, involved the relinquishment by the lessee of a restrictive covenant contained in the lease which was preventing the owner from selling the reversion. We held that the transaction constituted a sale of a capital asset under section 117 of the 1939 Code.

In *McCue Bros. & Drummond, Inc., supra*, the taxpayer occupied business premises under a lease which expired during the taxable year in question, but it continued in possession as a statutory tenant under the New York emergency rent control laws. As a statutory tenant the taxpayer had a right to remain in possession of the premises so long as it paid a reasonable rental. Its landlord paid it \$22,500 to vacate and surrender the premises. We

upheld the taxpayer's contention that it had transferred property rights to its landlord in exchange for the \$22,500 received and that the amount realized from the sale represented capital gain.

In each of the foregoing cases the lessee sold, transferred, conveyed or relinquished his leasehold rights for a stated consideration under a written instrument which clearly demonstrated the intention of the parties to effect an absolute transfer or sale of the rights of the lessee in the property. Such an agreement is lacking here. The three-way agreement executed by petitioners, Sweeny, and Pacific is couched throughout in the language of a lease or sublease. Petitioners are consistently referred to as lessors, Pacific is called the lessee, the monthly payments payable by Pacific to Voloudakis are described as rental, and the agreement is termed "this lease." Further, the instrument contains the covenant that "The Lessors hereby lease to the Lessee all of the property above described for a term of nine (9) years." It further provides, consistent with a landlord-tenant relationship, for re-entry of petitioner and reversion of the premises to him in case of Pacific's default.

In addition, the preliminary negotiations between Voloudakis and Pacific indicate that the intention of the parties was to create a lease arrangement rather than a sale. In the letter sent by petitioner to Churchill Cook, he offered "to vacate and to sublease the entire premises in an 'as is' condition for the full term of my lease at and for a gross rental at the rate of \$50,000 per year, which rental is to

be paid in monthly installments of 1/12th each month." In their letter to Pacific, petitioners referred to "our lease agreement wherein you are leasing the entire one story building," and suggested the payment of "advance rental" of \$35,000.

Both the terms of the agreement executed on April 8, 1947, and the negotiations preceding its execution indicate that petitioners and Pacific intended to and did create a relationship of landlord and tenant.

Further, petitioner, in describing his understanding of the purpose and effect of the transaction occurring April 8, 1947, did not state that he intended to sell his interest in the premises. His testimony on this point was indefinite and unresponsive. We are unable to find either from the agreement involved or from the circumstances surrounding its execution, that petitioners sold, transferred or intended to sell or transfer their leasehold interest in the Sweeny Building. As we view the agreement in question, the clear import of the instrument is that the original lease of March 5, 1946, continued in existence for the duration of its term and that petitioners retained a continuing interest in the premises during its existence.

The provisions for the payment to petitioners of the agreed rental present a further point of distinction between the instant case and those on which petitioners rely. The three-way agreement of April 8, 1947, provided for the leasing to Pacific of the Sweeny Building for a term of 9 years at an annual rental of \$50,000, payable \$1,900 per month to

Sweeny and \$2,266.67 per month to petitioners. However, in each of the decisions of this Court cited by petitioners in support of their position, the consideration received by the lessee in exchange for his leasehold interest was in the form of a cash payment, thereby clearly establishing a sales transaction. Since by the nature of the transaction here in issue petitioner received the consideration in equal monthly installments over a 9-year period, it would appear that no reason for the extension of capital gain treatment under section 117(a) and (j) of the 1939 Code exists. Consequently, we are of the opinion that the situation here presented is sharply distinguishable from the facts involved in our decisions in *Walter H. Sutliff*, *Isadore Golonsky*, *Louis W. Ray*, and *McCue Bros. & Drummond, Inc.*, all *supra*.

The petitioners insist that, under the applicable principles of the law of real property prevailing in Oregon, the transaction in question resulted in an assignment of the lease by petitioners to Pacific, rather than a sublease, with the result that petitioners disposed of the remainder of the leasehold term, retained no rights or obligations under the original lease and "stepped out of the picture." However, petitioner points to no Oregon statute or decision, and we find none, which would alter the application of common law principles to the issue presented. At common law, an assigning lessee does not remain liable to his landlord for rent or for the performance of any of the covenants of the lease. *Moline v. Portland Brewing Co.*, 73 Ore. 532, 144 P. 572;

1 Tiffany, *Real Property*, sec. 124 (3d ed. 1939); 32 *Am. Jur.*, *Landlord and Tenant*, secs. 313, 314, 318; 1 *American Law of Property*, p. 310. Under a sublease, however, the lessee does not dispose of his entire term under the lease and remains liable to his landlord for the payment of rent and for the performance of the other covenants of lease, unless specifically released therefrom. See Tiffany, *op. cit. supra*, p. 202. Here, we find nothing in the agreement of April 8, 1947, which either specifically or by implication indicates an intent on the part of Sweeny to release or discharge petitioners from their liabilities as tenants under the original lease.

Since the parties to the agreement in controversy did not eliminate the petitioners and substitute Sweeny in their place, the normal incident of an assignment of lease did not occur. See Tiffany, *op. cit. supra*, p. 197; 1 *American Law of Property*, p. 310. Petitioners also retained under the agreement a right of re-entry and the ousting of Pacific for condition broken. If a complete assignment had resulted from the execution of the foregoing agreement, petitioners would have retained no interest in the premises but instead would have been relegated to their contractual remedies in the event of a breach. The original lease agreement executed by petitioners and Sweeny on March 5, 1946, was not canceled but continued in force, and petitioners remained liable thereunder. We are of the opinion that the transaction consummated on April 8, 1947, was a sublease, rather than an assignment, and we accordingly hold that the amounts received by peti-

tioner from Pacific during the years in issue constitute rental income taxable under section 22(a) of the 1939 Code.

Issue 2

Findings of Fact

Petitioners' returns for 1950, 1951 and 1953 were timely filed, but their returns for 1949 and 1952 were not filed until August 17, 1954. Requests to extend the time for filing the 1949 return until September 15, 1950, were approved by the respondent.

Opinion

Petitioners did not attempt to introduce evidence relating to their failure to file timely returns for 1949 and 1952, and on brief they have not questioned the respondent's determination of additions to tax for failure to file timely returns pursuant to section 291(a) of the 1939 Code. Accordingly, the respondent's determination is sustained.

Issue 3

Opinion

The petitioners object to the determination by the respondent of additions to tax pursuant to section 294(d)(1) of the 1939 Code for failure to file a declaration of estimated tax or pay installments of estimated tax declared, together with the concurrent determination under section 294(d)(2) of the Code of additions to tax for substantial underestimation of estimated tax for each of the years in issue. Petitioners' contention that additions to tax should not be determined under both section 294(d)(1) and section 294(d)(2) for any one year is without

merit. We have held that as a matter of law additions to tax may properly be imposed under both of the foregoing sections of the 1939 Code for the same taxable year. *G. E. Fuller*, 20 T.C. 308, *affd.* 213 F.2d 102; *Harry Hartley*, 23 T.C. 353; *Charles M. Kilborn*, 29 T.C.— (Oct. 24, 1957). The respondent's determinations with respect to additions to tax under section 294(d)(1) and section 294(d)(2) of the Code for each of the years in issue are sustained.

Decision will be entered for the respondent.

Served May 12, 1958.

Tax Court of the United States
Washington

Docket No. 62444

STEVEN VOLOUDAKIS and KATHERINE
VOLOUDAKIS, Petitioners,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, filed March 12, 1958, it is

Ordered and Decided: That there are deficiencies in the income tax of these petitioners and additions to tax for the taxable years as follows:

Year	Deficiency	Additions to tax, I.R.C. 1939			
		Sec. 291(a)	Sec. 294 (d) (1) (A)	Sec. 294 (d) (1) (B)	Sec. 2 (d) (1) (B)
1949	\$1,868.66	\$ 467.16	\$ —	\$ 4.00	\$145.00
1950	3,241.66	—	387.47	—	258.00
1951	3,635.80	—	—	52.50	261.00
1952	4,093.68	1,023.44	—	75.00	254.00
1953	5,899.84	—	—	97.50	397.00

[Seal] /s/ G. G. WITHEY,
Judge.

Entered: March 18, 1958.

Served: March 20, 1958.

United States Court of Appeals
For The Ninth Circuit

Docket No. 62444

STEVEN VOLOUDAKIS, et al., Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW

Petitioners, Steven Voloudakis and Katherine Voloudakis, respectfully petition the United States Court of Appeals for the Ninth Circuit to review the adverse decision of the United States entered on the 18th day of March, 1958, determining the deficiency in Petitioners' federal income tax as follows:

		Additions to tax			
		Sec.	Sec. 294	Sec. 294	Sec. 294
	Deficiency	291(a)	(d) (1) (A)	(d) (1) (B)	(d) (2)
49	\$1,868.66	\$ 467.16	\$ —	\$ 4.00	\$145.95
50	3,241.66	—	387.47	—	258.31
51	3,635.80	—	—	52.50	261.78
52	4,093.68	1,023.44	—	75.00	254.63
53	5,899.84	—	—	97.50	397.64

I.

Jurisdiction

Petitioners on review are husband and wife, whose residence was and has been continuously since prior to 1947, in Portland, Oregon. Federal income tax returns for the calendar years 1949, 1950, 1951, 1952 and 1953 were filed with the Director of Internal Revenue for the District of Oregon, whose office is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

The Petitioners filed this petition pursuant to the provisions of Sections 7482 and 7483 of the Internal Revenue Code of 1954.

II.

Nature of Controversy

This controversy involves the proper determination of Petitioners' liability for Federal income tax for the years 1949, 1950, 1951, 1952 and 1953, and particularly whether the receipts from the hereinafter described transaction are properly taxable as ordinary income or properly taxable as capital gain.

On or about March 6, 1946, the Petitioners

leased certain real property situated in the business district of the City of Portland, for a term of years, from Sweeny Investment Co. (Ex. 1-A) and were in actual possession of said premises on the 8th day of April, 1947.

On said April 8, 1947 the Petitioners disposed of their leasehold interest in said real property pursuant to the provisions of a written agreement (Ex. 2-B) which included a down payment of \$35,000.00 and monthly payments of approximately \$2,200.00 throughout the balance of the term of the original lease. This latter document, although denominated a "lease" (and referring to the monthly payments as "rental") nevertheless divested petitioners of their entire interest in the leasehold estate.

Petitioners filed income tax returns for each succeeding year, reporting the transaction fully, and taking capital gains treatment as to the payments received. This procedure was not questioned until February 21, 1956, when a delinquency assessment for the years 1949, 1950, 1951, 1952 and 1953 was levied against petitioners on the grounds that the petitioners' receipts from the transaction were rental and therefore ordinary income and taxable as such.

The basic question presented is whether the transaction of April 8, 1947 was a sale of petitioners' leasehold interest in the property, or whether it was a sub-lease.

Petitioners respectfully submit that the decision of the Tax Court in sustaining the Collector of Internal Revenue was erroneous under the facts of

this case, and request the United States Court of Appeals for the Ninth Circuit to review said decision of the Tax Court of the United States and to reverse the same.

/s/ McDANNELL BROWN,

/s/ WILLIAM H. KINSEY,

/s/ JAMES R. MOORE,

Attorneys for Petitioners.

[Endorsed]: T.C.U.S. Filed June 11, 1958.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 24, inclusive, constitute and are all of the original papers as called for by the "Designation of Contents of Record on Review", including Joint Exhibits 1-A and 2-B, Respondent's Exhibits C thru M, attached to the Stipulation of Facts and Respondent's Exhibits N and O, admitted in evidence, in the case before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court has filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case as the same appear in the official docket in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United

States, at Washington, in the District of Columbia, this 27th day of June, 1958.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, Tax Court of the
United States.

[Title of Tax Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Court of Appeals Courtroom, United States Courthouse, Broadway and Main Streets, Portland, Oregon. Wednesday, February 20, 1957.

The above-entitled matter came on for hearing, pursuant to Calendar Call, at 2:00 o'clock, p.m.

Before: The Honorable Graydon G. Withey,

Appearances: William H. Kinsey and James R. Moore, 1001 Board of Trade Building, Portland, Oregon, on behalf of the Petitioner. John D. Picco, on behalf of the Respondent. [1]*

* * * * *

STEVEN VOLOUDAKIS

was called as a witness on behalf of the Petitioner and having [6] been first duly sworn, testified as follows:

The Clerk: State your name and address, Mr. Witness.

The Witness: Steven Voloudakis.

The Clerk: And your address, please?

The Witness: 1711 North Skidmore.

* Page numbers appearing at top of page of Reporter's Transcript of Record.

(Testimony of Steven Voloudakis.)

The Clerk: What city?

The Witness: Portland, Oregon.

Direct Examination

Q. (By Mr. Kinsey): What is your present occupation, Mr. Voloudakis? A. Hat renewing.

Q. At what location do you carry on your business? A. 421 Southwest Washington.

Q. What was your occupation in 1946?

A. Cleaning business.

Q. At what address was that business carried on?

A. That was—I think it was 1334 Southwest Morrison, between 13th and 14th on Morrison.

Mr. Kinsey: I'd like to have the witness presented with Exhibit 1-A, please.

(Document handed to witness by Clerk.)

Q. (By Mr. Kinsey): Exhibit 1-A is a lease between Sweeney Investment Company, dated March 5, 1946, and you and your wife. Does that lease cover the premises that you just referred to, at which you [7] carried on your business?

A. Yes.

Q. In 1946? A. Yes.

Q. Will you explain the circumstances under which that lease was executed?

A. The lease was executed to have cleaning and hat renewing between 13th and 14th on Morrison.

Q. Now, does this lease cover the whole block?

A. The whole block between Morrison and Yamhill.

(Testimony of Steven Voloudakis.)

Q. And bounded on the other sides by?

A. By 13th and 14th.

Q. By 13th and 14th? A. Yes.

Q. That's Southwest? A. Southwest.

Q. In the downtown Portland area?

A. Yes, 14th and Morrison and 13th.

Q. Now, you stated this lease covers the whole block? A. That's right.

Q. Prior to that time, you carried on business at the same location?

A. Yes, only I had about a fourth—one-eighth of the building.

Q. But under this lease, you took over the whole block? [8]

A. The whole block, that's right.

Q. How long did you remain in possession of the whole block under the lease, under Exhibit 1-A?

A. Oh, say about four or six months.

Q. Well, what's the date of that lease now?

Mr. Picco: Actually, your Honor, it's all right for this testimony to go in, but we have stipulated all of those dates, and it would indicate that he was in possession a little longer than that.

Mr. Kinsey: Yes, for a year. This is just a transition question.

Q. (By Mr. Kinsey): It is correct that you were in possession of it approximately a year, is that right?

A. Well, between four and six—perhaps a year, yes.

Q. Now, what were the circumstances surround-

(Testimony of Steven Voloudakis.)

ing your going out of possession, your vacating possession?

A. Well, the telephone company wanted to—they wanted to occupy the place, wanted to—wanted me to go out of there.

Q. Who first contacted you in regard to the telephone company's desires? A. Mr. Cook.

Q. What's his first name?

A. Churchill.

Q. Churchill Cook? [9] A. That's right.

Q. And negotiations ensued as a result of that contact, is that correct? A. That's correct.

Mr. Kinsey: I'd like to now have Exhibit 2-A substituted for—2-B substituted for 1-A in the hands of the witness, please.

(Documents substituted with witness by Clerk.)

Q. (By Mr. Kinsey): Now, Exhibit 2-B is a lease between Sweeney Investment Company, you and your wife, and the Pacific Telephone Company?

A. Yes.

Q. The lease is dated April 8th, 1947. Does that represent the results of the negotiations you just referred to? A. Yes.

Q. With the telephone company?

A. That's right.

Q. Did you vacate the premises pursuant to that lease? A. Yes.

Q. You vacated them completely?

A. Absolutely.

Q. Now, after you vacated the premises, did

(Testimony of Steven Voloudakis.)

you have any further contact with Sweeney Investment Company? A. No. [10]

Q. Did they make any claims against you?

A. No.

Q. Have you made any claims against them?

A. No.

Q. There has just been no contact whatsoever between you and Sweeney Investment Company?

A. No.

Q. Subsequent to the execution of the Exhibit 2-B——

A. I just put my coat on, cleared up the place, and that's the last I've seen of it.

Q. Now, in regard to the telephone company, after you vacated to the telephone company, did you have any contact with the telephone company subsequent to that time? A. Yes, every month.

Q. Now, what happened?

A. By sending me a check.

Q. But outside of your receiving the checks, did you have any contact with the telephone company? A. No.

Q. Did they make any claims against you?

A. Not to my knowledge.

Q. Did you make any claims against them?

A. No.

Q. Now, under the terms of this lease, it expired May 1, 1956. Either prior to such expiration date, or on the expiration [11] date, or thereafter, did Sweeney contact you in connection with anything? A. No.

(Testimony of Steven Voloudakis.)

Q. Did you contact Sweeney Investment Company? A. No.

Q. Did you contact the telephone company?

A. No.

Q. Did the telephone company contact you?

A. No, outside of every month.

Q. Yes, but you never went back into possession? A. No.

Q. Or made any claims—— A. No.

Q. ——of going back into possession?

A. No.

Mr. Kinsey: I have one more question. Mr. Voloudakis hasn't answered it right yet. As I'm going to phrase it, Counsel for Respondent may have an objection to it. If so, he can state it, but I want the record to show that the question was tendered.

Q. (By Mr. Kinsey): By virtue of this second lease agreement, the exhibit you now have in your hand, was it your intent and understanding that you gave up all of your interest in the leased premises in that block covered by the lease agreement? Now, before you [12] answer it——

Mr. Kinsey: Do you object to the question?

Mr. Picco: I'm going to let him answer it.

Q. (By Mr. Kinsey): You may answer the question.

A. I didn't quite get that right.

Q. Was it your intent and understanding that under this lease agreement, the exhibit that you have in your hand, to be that you surrendered all

(Testimony of Steven Voloudakis.)

of your rights—— A. Yes.

Q. ——of the leased premises? A. Yes.

Q. You retained no rights whatsoever?

A. No.

Mr. Kinsey: That's all, your Honor.

The Court: Supposing under the lease, it indicates that he didn't. Which is to govern?

Mr. Kinsey: I don't believe there is any conflict.

The Court: I know, but assume that the lease is different than the oral answer. Which is to govern?

Mr. Kinsey: That's a good question.

The Court: Was that the end of your examination?

Mr. Kinsey: Just one moment. Yes, that's all, your Honor. Your witness.

The Court: Cross examine. [13]

Cross Examination

Q. (By Mr. Picco): Mr. Voloudakis, you said you negotiated this agreement lease with the Pacific T. and T. through Mr. Cook, is that right?

A. Yes.

Q. What did you instruct Mr. Cook to do?

A. Well, I—he come in and in pretty near two or three weeks he wanted me to vacate the place, and he'd pay me so much every month, but I didn't want to offer any prices on it because I didn't know just if the object was to buy it, unless I have all the money in advance.

(Testimony of Steven Voloudakis.)

Q. Did you tell him to find you a purchaser?

A. No.

Q. What did you tell him?

A. I wasn't looking for a purchaser. He was looking for a location.

Q. Did you ask him to find you some tenant?

A. I didn't. He come to me. He asked me if I wanted to vacate the place.

Q. Well, can you describe just a little more exactly what sort of relationship you thought you were getting into?

A. Well, he asked me if I want to vacate the premises, which I have, if it would be so much and if I could get a substantial money on it. So, I told him if I have cash, why then, [14] I could—I might consider it.

Q. Now, you actually thought that you were leasing this thing out to Pacific T. and T., did you not?

A. No.

Q. Did you think you were selling something to Pacific T. and T.?

A. Just vacate my premises.

Q. Actually, as a matter of fact, you intended at all times to lease the property or sublease it to Pacific T. and T. after you found out about the arrangement?

A. I beg your pardon. I didn't quite get that.

Q. As a matter of fact, you intended at all times to lease the property to Pacific T. and T., or sublease to them, to Pacific T. and T.——

A. Well——

(Testimony of Steven Voloudakis.)

Q. —after you found out about Pacific T. and T. wanting the building, is that right?

A. The only thing they asked me, to vacate the premises.

Q. Now, did you tell Mr. Cook on or about January 17, 1947, just about two or three months before this lease was entered into, by letter, didn't you tell him that you were willing to sublease the Sweeney Building for a gross rental at the rate of \$50,000 a year? A. Not to my knowledge.

Mr. Picco: Would you mark this Respondent's Exhibit [15] N for identification?

The Clerk: Exhibit N for identification.

(Respondent's Exhibit N was marked for identification.)

Q. (By Mr. Picco): Now, Mr. Voloudakis, I'm handing you Respondent's Exhibit N for identification, which appears to be a letter dated January 17, 1947, written by yourself, to J. C. Cook, the realtor. Now, I'm going to ask you to look at this and tell me whether that's your signature there at the bottom of that letter? A. Yes.

Q. Now, do you remember that letter at all?

A. I recall these, but I can't recall these.

Q. Does that refresh your memory as to just what you figured you were getting into when you got into this lease with Pacific T. and T.?

A. Just getting so much per month for the period of the lease.

Mr. Picco: Respondent offers Exhibit N, Respondent's Exhibit N for identification in evidence.

(Testimony of Steven Voloudakis.)

Mr. Kinsey: May I inquire what the purpose is of this?

Mr. Picco: Yes. I want to establish here, just in case there is any doubt, that this is a sublease, definitely [16] intended to be a lease with all the incidents of a lease and sublease, namely the rights under a lease.

Mr. Kinsey: Well, then, I object to this because I don't see how that lends itself at all towards such a contention.

The Court: You object to it, I take it, on the grounds of materiality or relevancy?

Mr. Kinsey: Well, this is part of the negotiations culminating in the actual lease. It may be pertinent, but what I'm trying to get is what the connection is in connection with it, and I don't quite relate it up.

Mr. Picco: Your own——

The Court: Just a moment. What's the grounds for your objection?

Mr. Moore: One thing, your Honor, it purports to show what the agreement consists of, for one thing, and it is inconsistent with the actual agreement that was signed. It purports that certain terms existed. Those terms are not true. Those weren't the terms that were carried out.

The Court: I understand your argument, but I'm asking you merely what the grounds for your objection are, the particular grounds for your objection.

(Testimony of Steven Voloudakis.)

Mr. Kinsey: Well, I'll withdraw the objection and let it go in. I don't object to its going in.

The Court: I'll receive the exhibit. [17]

(Respondent's Exhibit N was received in evidence.)

Mr. Kinsey: But the fact——

The Court: You can argue the point you're now arguing better on brief than you can here.

Mr. Kinsey: Yes, except to the extent that it may confuse the witness, because our contention is not that it wasn't referred to as a lease, the term "lease" referred to in it, but, even so, substance prevails, and even this letter says, "In connection therewith, I agree to vacate and sublease the entire premises in and as is condition for the full term of my lease."

There is our contention in a nutshell, and, regardless of what you call it, whether it's sublease or lease, if it's for the full term of the lease, then it's an assignment. The common law says that it amounts to that.

The Court: Mr. Kinsey, you're making your argument now. I've ruled on the exhibit. It's in evidence. Proceed with your cross examination.

Q. (By Mr. Picco): Mr. Voloudakis, do you remember writing a letter dated April 7, 1947, which is the date that this lease instrument is dated, to the Pacific T. and T., which discusses their \$35,000 deposit as mentioned in the lease?

A. I might have, but I can't recall right now.

(Testimony of Steven Voloudakis.)

Mr. Picco: Will you mark this as Respondent's Exhibit O for identification?

The Clerk: Exhibit O for identification.

(Respondent's Exhibit O was marked for identification.)

Q. (By Mr. Picco): I hand you Respondent's Exhibit O for identification, which appears to be a letter dated April 7, 1947, written by you and your wife, to the Pacific Telephone and Telegraph Company, Portland, Oregon. I hand this to you and ask you if that is your signature there?

A. Yes.

Q. And is that the signature of your wife?

A. Yes.

Q. Both you and your wife were—signed the lease agreement of April 8th, 1947? A. Yes.

The Court: I think the agreement will speak for itself.

Mr. Picco: If your Honor please, I'm trying to get across—I thought the intent element possibly entered into the picture, and I want to establish the fact that this rental that's involved here, the \$35,000 deposit, was definitely rental, advance rental, as far as this particular individual is concerned, the man that got into the agreement, and it may [19] be very important at briefing time that I have this on that point.

Mr. Kinsey: We concede that it's referred to as rent, but it was referred to as a lease, and with that concession I don't see how this line of questioning is pertinent.

(Testimony of Steven Voloudakis.)

Mr. Picco: As I understand it, they're conceding, yet they aren't conceding this thing. It looks like a lease, but it isn't a lease.

The Court: You gentlemen——

Mr. Picco: I offer Exhibit O.

The Court: I'm very well aware of each of your contentions and what you have in mind. I suspect I know what's in the exhibit. Let's proceed.

Mr. Picco: I now offer Respondent's Exhibit O for identification.

The Court: Any objection?

Mr. Moore: We have no copy of that.

Mr. Picco: I'm going to make a copy of it for you if you want it.

Mr. Kinsey: May we see it?

Mr. Picco: Yes.

Mr. Kinsey: No objection.

The Court: It may be received.

The Clerk: Exhibit O.

(Respondent's Exhibit O was received in evidence.) [20]

Mr. Picco: That's all.

The Court: Redirect?

Mr. Kinsey: No, your Honor.

The Court: You may step down, Witness.

(Witness excused.)

The Court: Call your next witness.

Mr. Kinsey: Call Churchill Cook.

Whereupon

CHURCHILL COOK

was called as a witness on behalf of the Petitioner and having been first duly sworn, testified as follows:

The Clerk: Please state your name and address.

The Witness: The name is Churchill Cook, 13101 Southeast Rusk Road, Milwaukie.

Direct Examination

Q. (By Mr. Kinsey): What is your occupation? A. I'm a realtor.

Q. Are you licensed with the State?

A. Yes.

Q. Was that also your occupation in 1947?

A. Yes, sir.

Q. When did you first meet Mr. Steven Voloudakis, the gentleman who just preceded you on the stand?

A. Well, in 1947, early in 1947, I walked off the street [21] and introduced myself to him. I had learned through some source or other that he had a lease on the entire premises.

Q. Now, what premises?

A. Southwest 13th and 14th, Morrison and Yamhill, that block, square block. At the time, I was looking for space for the telephone company.

Q. The telephone company had—

A. They had asked me to locate space for them. In fact, they told me their requirements would be five contiguous floors in an office building. They required them for office purposes. I had contacted

(Testimony of Churchill Cook.)

every building of any consequence in town, and there was no such thing available or even close thereto. So, I reported that to them, and they told me it was a situation where they had to have space. As a matter of fact, the urgency for space was that they had—prior to the war, they had ordered their automatic switching equipment, automatic equipment manufactured, and they discontinued the work on it during the war, and, when the war was over, they resumed the work, and they had received notification that the material was on the way. So, they had revenue—what they called their revenue accounting office, that is, the bureau in which all the bills are issued, in that building on Park Street over here, and they required that space for this equipment that was on the way. So, they were very desperately in need of—they wanted 50,000 square feet of office space. Not being available, I looked [22] around at every source I could think of for space, and I had heard some place that Mr. Voloudakis had a lease on that entire block. So, I walked in and introduced myself to him and asked him whether he would consider selling out and getting out.

Q. And those negotiations culminated in the execution of the three-way agreement between Sweeney Investment Company, the Voloudakis, and Pacific Telephone and Telegraph Company, is that correct?

A. That's right.

Q. Now, is it correct that part of the deal was that Mr. Voloudakis had to vacate completely?

(Testimony of Churchill Cook.)

A. Entirely.

Q. And he retained no interest in the premises?

A. He had to get out.

Q. After the telephone company went into possession, what did it do to the premises?

A. Well, they did very extensive remodeling because it virtually was a, oh, a garage type structure, what there was, and they spent a large sum of money to make it into office space.

Q. And they're still in possession?

A. Yes.

Q. They occupy the whole block?

A. That's correct.

Q. No one else occupies the block?

A. No. [23]

Q. Is it true that the nature of the telephone company's occupancy is such that no one else can occupy any of it except the telephone company?

A. That's correct.

Q. Now, that lease, that three-way one, that Exhibit 2-B, expired on May 1, 1946, I understand, or '56.

A. About then.

Q. Is it your knowledge that the telephone company negotiated a new lease?

A. I've been told they did.

Q. In any event, they're still in possession of the premises?

A. Yes.

Q. I'll hand you Exhibit N and ask you to review it. Did you draft that exhibit?

A. Yes, I did, and whether it was—I drafted it, yes.

(Testimony of Churchill Cook.)

Q. I'll hand you that exhibit.

The Court: Which one are you handing him?

Mr. Kinsey: That's O.

The Witness: Yes, sir, I drafted this too.

Mr. Kinsey: That's all, your Honor.

The Court: Cross examine.

Cross Examination

Q. (By Mr. Picco): Just tell us under what circumstances you drafted [24] Exhibits N and O.

A. Well, the first one was sort of a summation of all the conversations on the thing that we had. In other words, to put this deal together, you understand that Mr. Voloudakis did not know of whom I was talking at all, in fact, or who wanted the space. I simply told him that I had a concern that was worth a million dollars or more, who would want the space. In other words, I had to put something together to get him to agree to something.

Q. He knew he was dealing with an outfit that had a million dollars or more, did he not?

A. That's right, that's correct.

Q. Why did you—this Exhibit N then, as far as you could see it, is exactly what the parties had in mind at the time, is that it?

A. Well, it was putting together the facts of the situation, sort of put them on a negotiation basis.

Q. You know exactly what Exhibit N shows? It talks in terms of subleasing and leasing and rentals?

A. Yes.

Q. Now, when you made a statement earlier in

(Testimony of Churchill Cook.)

your testimony that you went in and asked him whether he would consider selling out, in view of this Exhibit N, and now that your memory is probably refreshed because you've looked it over, wasn't it more likely you went in and asked him whether he [25] wanted to lease or sublease——

A. No, I don't think so.

Q. ——to someone that you were representing?

A. No, I don't think so. In other words—you understand he had a lot of equipment and one thing or another, and one of the first things he told me, when I went in there, he didn't think he'd be interested. He said he had just spent some \$80,000 or something in new equipment, and he didn't think he'd be interested.

Q. Well, this may be repeating, but, as far as you know, this Exhibit N represented the thoughts of the parties at the time?

A. Well, it's the terminology that I used there.

Q. And that really culminated in this Exhibit 2-B, which you seem to know about?

A. 2-B. Which is that?

Q. That's the lease in question. That's correct, is that right? A. Yes.

Q. Now, another question was asked of you, whether Mr. Voloudakis retained any interest in the premises, and you said, "No". Now, you were referring, were you not, by that, that he gave up possession of the property? A. That's correct.

Mr. Picco: That's all, your Honor. [26]

The Court: Any redirect?

(Testimony of Churchill Cook.)

Mr. Kinsey: That's all, your Honor.

The Court: You may step down.

(Witness excused.)

Mr. Kinsey: Petitioners rest.

The Court: Before you rest, I'd like to recall Mr. Voloudakis. Will you come up here, Mr. Voloudakis?

Whereupon

STEVEN VOLOUDAKIS

having been previously sworn, resumed the stand.

Examination by the Court

The Court: Mr. Voloudakis, you're not a lawyer, I take it?

The Witness: No, I'm not.

The Court: Will you tell me what your idea of a lease is?

The Witness: I have made one, your Honor, but I don't know from one end to the other.

The Court: Well, what do you think a lease is?

The Witness: Well, just more or less you rent a place and you want to be sure you stay five years or ten years, or if you just—it makes you secure that you've got that much time to occupy the premises.

The Court: Now, when you were in these premises, you leased a whole block, as I understand it?

The Witness: Yes, your Honor.

The Court: But you didn't occupy the whole block yourself, did you?

The Witness: Not at that time, no, I didn't.

(Testimony of Steven Voloudakis.)

The Court: And you subleased part of the block to other people, did you?

The Witness: No, your Honor. It was occupied by other firms until their time was up. They had about a six months lease.

The Court: I see.

The Witness: But I was paying the rent for the full block.

The Court: Now, when you went into this block under the lease, you understood that you were going to have to pay rent for the whole block?

The Witness: That's right.

The Court: And did you understand that you had a contract with the owner that required you to pay that rent?

The Witness: That's right.

The Court: All right, and did you understand that you had a contract with that owner that required you to pay that rent over a fixed period of time?

The Witness: Yes.

The Court: How long was that?

The Witness: I believe that was for six or seven [28] years I was there for the — before this last lease.

The Court: But how long did the lease have to go yet?

The Witness: Oh, it had about nine years to go.

The Court: And you knew that the owner could say to you, "You pay me the rent for nine years"?

The Witness: That's right.

(Testimony of Steven Voloudakis.)

The Court: You realized that?

The Witness: That's right.

The Court: Now, what did you think was going to happen to that contract, that lease, when you left the premises?

The Witness: Well, I couldn't sign the lease, your Honor, unless the landlord consented. I couldn't go out—I can't vacate the place unless the landlord stopped the lease or something, or rent it or vacate it, unless I—I couldn't even sell it if I wanted to sell it unless I have the landlord's consent.

The Court: And did the landlord give you his consent?

The Witness: That's right. I couldn't make the change otherwise.

The Court: How did he give you the consent?

The Witness: They had this Norris & Beggs as their agent.

The Court: Is it agreeable between Counsel here that there is a consent by this landlord?

Mr. Kinsey: Your Honor, Exhibit 2-B is a three-way [29] agreement. One of the three parties is the original lessor. So, by virtue of their being a party, they consented of necessity to the whole thing.

The Court: All right. You may step down, unless there are some further questions.

Mr. Picco: Nothing further.

(Witness excused.)

The Court: Do you have some testimony?

Mr. Picco: No, I have not, your Honor.

The Court: I take it you rest?

Mr. Picco: That's right.

The Court: Sixty days for simultaneous briefs, 30 days for reply. State the dates, please.

The Clerk: Original briefs will be due on or before April 22nd and reply briefs on or before May 22nd, 1957.

The Court: All right, that concludes this case.

(Whereupon, at 2:40 o'clock p.m., the hearing in the above-entitled matter was closed.) [30]

[Endorsed]: T.C.U.S. Filed March 4, 1957.

[Endorsed]: No. 16092. United States Court of Appeals for the Ninth Circuit. Steven Voloudakis and Katherine Voloudakis, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: July 16, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of Court of Appeals and Cause.]

STIPULATION WITH RESPECT
TO PRINTING EXHIBITS

Whereas, there are a number of documentary exhibits which would be expensive to print, but which each party on brief and in argument will wish to refer to;

It Is Hereby Stipulated by and between the parties, through their attorneys of record, subject to the approval of the Court, that all of the documentary exhibits may be considered by this Court in their original form, and need not be printed in the record.

The Exhibits to which this Stipulation refers are numbers 1-A and 2-B (joint exhibits) and Respondent's exhibits 3-C through M (all of the foregoing being included in the Stipulation of Facts) and Respondent's exhibits N and O, admitted upon the hearing. These include all of the exhibits introduced at the trial of this cause.

Dated July 25th, 1958.

/s/ CHARLES K. RICE,
Assistant Attorney General,
Attorney for Respondent.
/s/ McDANNELL BROWN,
Attorney for Petitioners.

[Endorsed]: Filed July 26, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD
TO BE PRINTED

To: Hon. Paul P. O'Brien, Clerk of United States
Court of Appeals for the Ninth Circuit:

Appellants designate the following documents to
be included in the printed Transcript of Record in
this proceeding:

- (1) Petition
- (2) Answer
- (3) Stipulation of Facts, omitting the exhibits
- (4) Transcript of the proceedings before the Tax
Court, omitting opening statements of counsel
- (5) Findings of Fact and Opinion
- (6) Decision
- (7) Certificate of Clerk to transcript of record
- (8) Stipulation with respect to printing exhibits
- (9) Statement of Points Relied Upon.

Dated this 25th day of July, 1958.

/s/ McDANNELL BROWN,
Attorney for Appellants.

[Endorsed]: Filed July 26, 1958. Paul P.
O'Brien, Clerk.



United States
COURT OF APPEALS
for the Ninth Circuit

STEVEN VOLOUDAKIS and KATHERINE
VOLOUDAKIS,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVE-
NUE,

Respondent.

APPELLANTS' OPENING BRIEF

*Petition to Review a Decision of the Tax Court
of the United States.*

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FILED

NOV - 6 1958

PAUL P. O'BRIEN, CLERK



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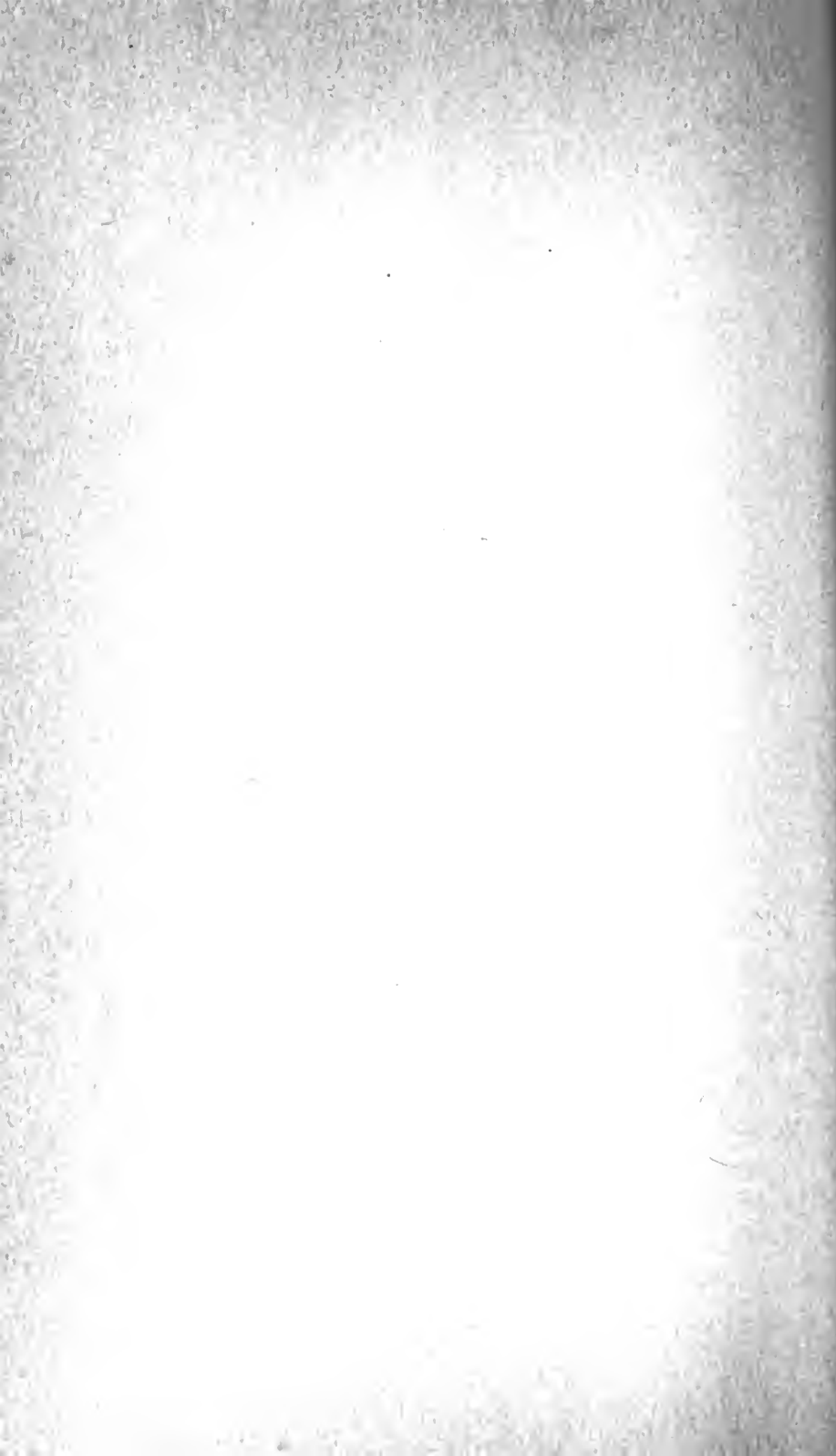
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United States
COURT OF APPEALS
for the Ninth Circuit

STEVEN VOLOUDAKIS and KATHERINE
VOLOUDAKIS,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVE-
NUE,

Respondent.

APPELLANTS' OPENING BRIEF

*Petition to Review a Decision of the Tax Court
of the United States.*

JURISDICTION

This appeal involving a redetermination of deficiencies in income taxes, and penalties for the years 1949, 1950, 1951, 1952 and 1953 is taken from the decision of the Tax Court of the United States entered on the 18th day of March, 1958 (R. 39), pursuant to Findings of Fact and Opinions filed in said court on the 12th day of March, 1958 (R. 23). The Tax Court had jurisdiction under the provisions of the laws of the United States, particularly 26 U.S.C.A. 7442 (I.R.C. 1954), 26 U.S.C.A. 6212, 6213, 6214 (I.R.C. 1954).

Petitions for review were filed by petitioners on June 11, 1958 (R. 40). Accordingly, this Court has jurisdiction under the laws of the United States, particularly 26 U.S.C.A. 7482, 7483 (I.R.C. 1954).

STATEMENT OF THE CASE

The parties involved in the transactions with which this case is concerned are Steven and Katherine Voloudakis, original lessees, herein referred to as "Appellants," the Sweeny Investment Company of Spokane, Washington, owners of the subject property and lessor, herein referred to as "Sweeny," and the Pacific Telephone and Telegraph Company, the ultimate lessee, herein referred to as "Pacific."

The question here presented for decision is whether the proceeds received by Appellants from a transaction whereby a leasehold estate which they had acquired was transferred to Pacific, were entitled to be taxed on a capital gains basis as the proceeds of a "sale or exchange," or whether they were taxable as ordinary income as rental under a sublease.

STATUTES INVOLVED

Capital Gains:

I.R.C. (1939) 117 (a), 117 (4).

Ordinary Income:

I.R.C. (1939) 22 (a).

Penalties:

I.R.C. 291 (a).

I.R.C. 294 (d) (1) (A).

I.R.C. 294 (d) (1) (B).

I.R.C. 294 (d) (2).

THE FACTS

As their name indicates, the Appellants were Greek immigrants, who have been engaged in the cleaning and second-hand clothing business in the City of Portland (R. 19). Sweeny was the owner of an entire block situated in the City of Portland, Oregon, between the streets of S.W. 13th, S.W. 14th, Morrison and Alder, on which there was a one-story building covering the entire block (R. 20). Prior to March 5, 1946, Appellants had been carrying on their business in a portion of this building. Other parts of the building had been leased to other tenants. On March 5, 1946, Appellants entered into a lease agreement with Sweeny for the entire block, subject to the other tenancies which were shortly to expire (R. 45). As additional space became available Appellants expanded their business operation, remodelled the building to suit their needs and purchased a substantial amount of equipment (R. 46).

For some time prior to April 8, 1947, Mr. Churchill Cook, a realtor of Portland, as agent for Pacific, had been endeavoring to locate additional space for that company to accommodate its expanding operation (R. 57). Pacific was under the immediate necessity of moving its revenue accounting office and was looking for some 50,000 square feet of office space, or five contigu-

ous floors in an office building (R. 58). Mr. Cook had been unsuccessful in locating any such space for Pacific until he learned that Appellants had a lease on the entire Sweeny block, so, as he said, "I walked in and introduced myself to him (Appellant), and asked him (Appellant) whether he would consider selling out and getting out" (R. 58). After some negotiations Appellants agreed to vacate the premises completely to Pacific (Exs. N and O) for the balance of their lease term, and which negotiations ultimately culminated in the execution of a three-way agreement between Sweeny, Pacific and Appellants (Ex. 2-B) (R. 58). This new three-party agreement covered all and precisely the same property covered in the original lease to Appellants; it ran for the full balance of the term of the former lease and on almost precisely the same terms, except as to the rental reserved.

Under the 1947 agreement Pacific was obligated to pay rent directly to Sweeny (Ex. 2-B, Par. 2(a)), and Pacific covenanted with Sweeny to carry out the usual obligations of a lessee (Ex. 2-B).

Appellants had no further obligation to Sweeny under the 1947 agreement, either to pay rent or otherwise (Ex. 2-B; R. 47, 48).

As a consideration for this agreement Pacific agreed to pay Sweeny \$1,900.00 per month rental. (This included the \$1,600.00 per month rental due from Appellants to Sweeny under the original lease and a \$300.00 a month increase.) Pacific also agreed to pay Appellants \$35,000.00 upon the execution of the agreement, and addi-

tional monthly payments throughout the entire balance of the lease period of approximately nine years (Ex. 2-B).

Subsequent to the execution of the lease to Pacific Appellants vacated the premises completely. "I just put my coat on, cleared up the place, and that's the last I've seen of it." (R. 48).

The Appellants intended to transfer, and Pacific intended to obtain, all of the leasehold premises for the full remaining period of Appellants' term (Ex. N, Ex. 2-B; R. 49, 50).

Pacific immediately took possession and "did very extensive remodelling because it virtually was a, oh, garage-type structure, what there was, and they spent a large sum of money to make it into office space," and, indeed, rendered the property unsuitable for any occupancy but their own (R. 59). Pacific remained in occupancy during the entire balance of the lease.

When Pacific's right to possession of the premises expired under the agreement of April 8, 1947, Appellants made no claim to possession, nor were they contacted in any way by either Sweeny or Pacific (R. 49). Upon its expiration Pacific remained in possession under a new lease with Sweeny.

Appellants had no further business transactions in connection with the property or with Sweeny or with Pacific, except the receipt of monthly payments from Pacific provided for in the agreement (R. 48).

In the first income tax return filed by Appellants subsequent to the Pacific lease, the transaction of April 8,

1947 was accurately reported on the return and capital gains treatment of the payments received was claimed on the grounds that the transaction constituted a sale of a capital asset, to-wit: Appellants' leasehold interest in the property (R. 20). No question was raised as to this procedure for several years thereafter, and Petitioners continued to file their tax returns in each case containing a statement of the transaction and giving the receipts of the transaction capital gains treatment and paying the tax thereon.

Not until February 21, 1956 (R. 7), was any question raised, when the Respondent took the position the transaction above referred to was not a sale of Appellants' leasehold interest, and entitled to capital gains treatment, but was a sublease to Pacific and that the payments received were rental income and therefore taxable as ordinary income to Appellants. Their tax liability was recomputed on this basis and a deficiency assessment levied against them as follows:

		Additions to tax			
		Sec. 291(a)	Sec. 294(d)(1)(A)	Sec. 294(d)(1)(B)	Sec. 294(d)(2)
ar	Deficiency				
49	\$1,868.66	\$ 467.16	\$..	\$ 4.00	\$145.95
50	3,241.66	..	387.47	..	258.31
51	3,635.80	..	..	52.50	261.78
52	4,093.68	1,023.44	..	75.00	254.63
53	5,899.84	..	..	97.50	397.64

A timely petition for review of the Commissioner's assessments was filed by Appellants (R. 3), a hearing was held before the Tax Court of the United States (Withey, Judge) in February, 1957. The Court's opinion was filed March 12, 1958 (R.23-39) and the decision was

entered March 18, 1958, sustaining the assessment of the Commissioner and holding the amounts received by Petitioners during the years in issue from Pacific pursuant to the terms of the agreement executed April 8, 1947 constituted rental income, taxable under Section 22 (a) I.R.C. 1939 (R. 39, 40). The decision also affirmed the assessment of the penalties listed in the above schedule. With reference to these penalties, Mr. Picco, counsel for the Respondent in the hearing before the Tax Court, made the following statement:

"I may say one other thing, your Honor. It appears there are some delinquency penalties and negligible penalties also involved in this case but I do not think Petitioners are contesting those particular penalties, so far as the merits are concerned."

"Of course, if they win on a primary issue that will take care of itself."

The gist of the decision below is as follows:

"The petitioners insist that, under the applicable principles of the law of real property prevailing in Oregon, the transaction in question resulted in an assignment of the lease by petitioners to Pacific, rather than a sublease, with the result that petitioners disposed of the remainders of the leasehold term, retained no rights or obligations under the original lease and 'stepped out of the picture.' However, petitioner points to no Oregon statute or decision, and we find none, which would alter the application of common law principles to the issue presented. At common law, an assigning lessee does not remain liable to his landlord for rent or for the performance of any of the covenants of the lease. *Moline v. Portland Brewing Co.*, 73 Ore. 532, 144 P. 572, 1 *Tiffany, Real Property*, sec. 124 (3d ed. 1939); 32 Am. Jur., Landlord and Tenant, Secs. 313, 314, 318; 1 American Law of Property, p. 310. Under a sublease, however, the lessee does not dis-

pose of his entire term under the lease and remains liable to his landlord for the payment of rent and for the performance of the other covenants of lease, unless specifically released therefrom. See *Tiffany op. cit. supra*, p. 202. Here, we find nothing in the agreement of April 8, 1947, which either specifically or by implication indicates an intent on the part of Sweeny to release or discharge petitioners from their liabilities as tenants under the original lease.

"Since the parties to the agreement in controversy did not eliminate the petitioners and substitute Sweeny (sic) in their place, the normal incident of an assignment of lease did not occur. See *Tiffany, op. Cit. supra*, p. 197; I American Law of Property, p. 310. Petitioners also retained under the agreement a right of re-entry and the ousting of Pacific for condition broken. If a complete assignment had resulted from the execution of the foregoing agreement, petitioners would have retained no interest in the premises but instead would have been relegated to their contractual remedies in the event of a breach. The original lease agreement executed by petitioners and Sweeny on March 5, 1946, was not canceled but continued in force, and petitioners remained liable thereunder. We are of the opinion that the transaction consummated on April 8, 1947, was a sublease, rather than an assignment, and we accordingly hold that the amounts received by petitioners from Pacific during the years in issue constitute rental income taxable under Section 22 (a) of the 1939 Code." (R. 36-38)

SPECIFICATIONS OF ERROR

1. The Tax Court was in error in its opinion and decision that the transaction consummated on April 8, 1947 (Ex. 2-B), was a sublease rather than an assignment of Appellants' leasehold estate, and accordingly, that the

amounts received by Appellants from Pacific during the years in issue constitute rental income taxable under Section 22 (a) of the 1939 Code, and not capital gains; that such opinion and decision are not supported by the facts, are contrary to the facts and contrary to applicable law.

2. The Tax Court was in error in affirming the Commissioner's assessment of penalties for the tax years in question under both Section 294 (d) (1) and Section 294 (d) (2) of the Internal Revenue Code.

SUMMARY OF ARGUMENT

It will be the contention of Appellants that the transaction consummated on April 8, 1947, and evidenced by Exhibit 2-B, constituted as between Appellants and Pacific, a sale or assignment of Appellants' leasehold estate in real property, a capital asset; that the payments received by Appellants from Pacific were installment payments on the purchase price and as such were properly reported by Appellants on a capital gains basis and taxable accordingly; that the transaction as between Appellants and Pacific was *not* a sublease and the payments received from Pacific were *not* rental payments and taxable as ordinary income under Section 22 (a) I.R.C. 1939.

As between Sweeny and Pacific the transaction was clearly and definitely a lease as the contract is labeled. Appellants were made parties to the agreement to effect a transfer or assignment of their leasehold interest.

The decision in this case hinges on the determination of whether or not the document executed April 8, 1947, by Pacific and Sweeny (Ex. 2-B) constituted, in legal effect, an assignment of Appellants' leasehold interest in the premises to Pacific as contended by Appellants, or whether it was a sublease of their leasehold estate, or a part thereof to Pacific, as held by the Tax Court.

It is the contention of Appellants that the undisputed facts do not support the findings and conclusions of the Tax Court; that the Tax Court was in error in its statement of the legal propositions cited in support of its decision; and that the decisions and authorities cited do not support those propositions.

Contrary to the suggestion of the Tax Court, Appellants do not contend that there is any Oregon decision "which would alter the application of common law principles to the issue presented." On the contrary, Appellants argue for the application of well-established common law principles and principles which have been approved in repeated decisions by the Oregon Supreme Court. It is not the law in Oregon, or generally, that "an assigning lessee does not remain liable to his landlord for rent or for the performance of any of the covenants of the lease." The *Moline* case (73 Ore. 532) cited by the Tax Court in support of this proposition was not followed in the later case of *Houston v. Barnett*, 90 Ore. 94, and was expressly repudiated in *Barde v. Portland News Publishing Co.*, 152 Ore. 77 (p. 82). Neither do the citations from 32 Am. Jur. nor from *Tiffany on Real Property* support this asserted proposition.

The Tax Court found that the new contract (Ex. 2-B "did not eliminate the petitioners and substitute Sweeny (sic) in their place." This new agreement clearly was a direct and complete substitute for the original lease of March, 1946, by which the owner, Sweeny, leased to Pacific the identical property for the precise period of time and under practically identical conditions and terms specified in the original lease. Pacific became a direct lessee in possession under Sweeny replacing appellants.

The Tax Court considered the provision for a right of reentry on condition broken as significant, if not controlling, in determining that the document was a sublease and not an assignment. The great weight of authority, however, is that such a provision does not alter the nature of the agreement; that such provision merely provides a chose in action and not a reversionary interest.

The lower court also held that the original lease of March 5, 1946, "was not cancelled but continued in force," and this in spite of the fact that the owner had leased this property, all of it, for the full balance of the term to Pacific, in which lease the Appellants joined in order to dispose of their interest.

Based upon these misconceptions of the rules of law applicable and the misapplication of the authorities cited, the Tax Court arrived at the conclusion that "we are of the opinion that the transaction consummated on April 8, 1947 (Ex. B) was a sublease rather than an assignment, and we accordingly hold that the amounts received by Appellants from Pacific during the years in

issue constituted rental income taxable under Section 22 (a) of the 1939 Code," regardless of the fact that the legal consequences of the transaction effected a complete transfer to Pacific of Appellants' entire leasehold estate.

It will also be contended by Appellants that the Commissioner should not have assessed penalties for the same years for substantial understatement of estimated tax and, in addition, a penalty for failure to file declaration of estimated tax, and particularly that it was improper for him to assess a penalty for substantial understatement of estimated tax when the error was not an understatement or an underestimation, but an error made in good faith as to the basis of the tax (Stip. Facts 5, 6; R. 20, 21).

ARGUMENT

At the outset it may appropriately be pointed out that it has never been contended in this proceeding that the assignment of a leasehold does not qualify for capital gains treatment under Section 117 (J), Internal Revenue Code 1939. The issue here is whether the transaction of April 8, 1947 constituted an assignment of Appellants' leasehold estate, as they contend, or was a sublease thereof as held by the court below.

In asserting the proposition that "an assigning lessee does not remain liable to his landlord * * *" the decision below first cites and underscores the Oregon case of *Moline v. Portland Brewing Co.*, 73 Ore. 532. However, in the later Oregon case of *Houston v. Barnett*, 90 Ore.

94, the Oregon Supreme Court held to the contrary (p. 100):

“Notwithstanding the assignment, Barnett as lessee continued liable on the covenants in the lease to pay rent and taxes which accrued subsequent to the assignment. After the transfer the assignee then became liable to the lessors for the rental and taxes, and the lessors at their election could then sue either the lessee or the assignee, or both at the same time, although they could have but one satisfaction. It is well-settled that the assignee of a leasehold is personally liable for rent accruing while he retains the leasehold.”

Both the *Moline* case and the *Houston* case were referred to in the decision of the Oregon Supreme Court in the case of *Barde v. Portland News Publishing Company*, 152 Ore. 77, wherein the Court (at p. 82) after quoting from the *Houston* case the portion set forth above, said:

“We are not unmindful that the ruling in *Moline v. Portland Brewing Co.* * * * which announced a contrary doctrine to that announced in *Houston vs. Barnett*, supra. The rule announced in the *Moline* case is not supported by any authority cited therein and is shown to be incorrect by all the authorities bearing upon the question in the absence of some covenant or agreement on the part of the assignee to perform the terms and conditions contained in the lease which, of course, would render an assignee liable for rent during the entire term whether in the meantime he had reassigned the lease or not.”

Thus the Tax Court's authority was repudiated.

The Tax Court decision further cites 32 Am. Jur., Landlord and Tenant. We quote the following from this authority:

"An assignment of a leasehold is a transaction whereby a lessee transfers his entire interest in demised premises, or a part thereof, for the unexpired term of the original lease, thereby parting with all of the reversionary estate in the property, and is thus distinguishable from a sublease which contemplates the retention of a reversion by the lessee. The form of the transaction is not material, its character in law being determined by its legal effect. In the case of a written transaction, this is a question of law to be determined from the estate granted in the instrument executed. A transaction between a lessee and a third person in the form of a lease or sublease may nevertheless operate as an assignment as between the original lessor and such third person. (Sec. 313, p. 289)

"The distinction between an assignment of a lease and the subletting of the premises lies in the quantity of interest that passes by the transfer, and not upon the extent of the premises involved. Primarily, the test is whether, by the transaction, the lessee conveys his entire term or retains a reversionary interest, however, small. As a general proposition, if by the transaction the lessee conveys the entire term and thereby parts with all reversionary interest in the property, the transaction is construed to be an assignment; but if there remains a reversionary interest in the estate conveyed, it is a sublease.

* * * The tenant who parts with the entire term embraced in his lease becomes an assignor of the lease, and the instrument is an assignment; but where the tenant, by the terms, conditions or limitations in the instrument does not part with the entire term granted him by his landlord so that there remains in him a reversionary interest, the transaction is a subletting, and not an assignment.

* * * And at common law, a leasing by the lessee for the entire term, even at a different rent, reserving the right of re-entry for condition broken, as between landlord and the sublessee, was regarded as an assignment of the term. However * * * the

instrument must convey not only the entire time for which the lease runs, but the entire estate or interest conveyed by the lease." (Par. 314, pp. 290, 291)

"Some of the authorities take the view that a provision for the redelivery of the possession to the original lessee on the last day of the term renders the transaction a sublease and not an assignment, but others hold that if the transaction is in the form of lease for the entire period of the unexpired term of the original lease, it is to be regarded as an assignment and not a sublease, even though the instrument contains a provision for the surrender or redelivery of the possession to the original lessee at the end of the term." (Par. 316, p. 292)

(Note: Paragraph 18 of the Pacific contract, Ex. 2B, DOES NOT provide for redelivery of possession to Appellants, the original lessees.)

"While it is generally agreed that a reservation of rent in an instrument in the form of a lease will not change the legal operation of the instrument as an assignment if the lessee parts with his entire interest in the term, there is considerable conflict of authority as to whether the reservation of a right of re-entry for the assignee's breach of covenant and conditions necessarily stamps the transaction as a sublease rather than an assignment. The generally accepted view, however, is that the reservation of such a power of re-entry is not sufficient to prevent the transaction from being an assignment. This rule is based on the theory that the right of re-entry is not an estate or interest in land nor the reservation of a reversion; but is merely a chose in action, and, when exercised, the grantor comes into possession of the premises through the breach of the condition and not by reverter." (Par. 317, p. 292)

The Tax Court in its decision herein seems to rely

heavily on the authority of Tiffany on Real Property. From the various sections cited in its opinion we quote the following:

"A transfer of the tenant's entire interest in the whole premises leaving no reversion to him has usually been regarded not as a sublease but as an assignment * * *. And the fact that the transfer is in the form of a sublease or reserves rights as against the transferee similar to such as are ordinarily reserved on a lease, has been considered immaterial * * *." (Sec. 123, p. 97, 1 Tiffany on Real Property, 3rd ed. 1939)

"The sublessee is not privity of contract with the head landlord since there is no contractual relation between them." (Sec. 124, p. 201, *ibid*)

"As a lessee is not relieved of his contractual liabilities by his assignment to another even though the other becomes liable," etc.

"The lessee is, however, relieved from liability if the sublessee is substituted as tenant by a new demise effectuating a surrender of a former term." (Sec. 124, p. 202, *ibid*)

There can be no doubt but that the propositions enunciated in the foregoing authorities are the established law in Oregon under decisions of the Oregon Supreme Court.

"Where a person other than the lessee is shown to be in possession of leased premises, paying rent therefor, the law will presume that the lease has been assigned to him.'" *First National Bank v. Hazelwood Co.*, 85 Ore. 403, 407.

"A distinction properly may be drawn between a case of subtenancy and one where the original tenant assigns to another the whole of his estate under the lease. The owner of the fee may create an estate for years in the land by a lease to his tenant, re-

serving a rent. The tenant, being thus the owner of an estate in land, may of right, unless restrained by the terms of the lease, convey that estate entirely to another, who thus becomes the assignee of the lease, assuming all its obligations, including the payment of the rent. By virtue of the transfer of this entire identical estate originally created by the owner of the fee, there springs up by operation of law a privity of estate between the original landlord and the subtenant, that is to say, they are both concerned in the same estate, the one as its creator and the other as its assignee. This is not true, however, where the original tenant creates a new and different estate, although one for years, and confers it as a lessor upon a subtenant. No privity of estate arises under such circumstances, between the owner in fee and the subtenant. It is not an estate to the creation of which the owner in fee has been a party. The contract by which the subtenancy was created was a transaction to which he was a stranger and in which he cannot be compelled by a subtenant to participate." *Backus v. West et al*, 104 Ore. 129 141, 142)

In an earlier case the Oregon Supreme Court said:

"Tiffany on Landlord and Tenant (page 950) states that, for the purpose of enforcing the payment of rent, a person, other than the lessee, found in possession of the premises will be prima facie presumed to be in possession as signee of the leasehold, which presumption may be rebutted by evidence that there was no actual assignment, or that he is a sublessee, in which latter case he is not liable to the landlord on the covenants of the original lease. His liability is upon the covenants of the sublease and to his lessor only." *Culver v. Van Valkenburgh*, 60 Ore. 447, 449.

Thus the basic distinction between an assignment of a lease and a subletting is clearly recognized by the Supreme Court of Oregon. Furthermore, while there is

no case squarely on the point, the Oregon Supreme Court, consistent with its decisions, could not do otherwise than follow the general rule announced in *Am. Jur.*, *supra*, that the legal consequences of the document being an assignment would not be affected by its being couched in the terms of a lease, or was called a lease, and used such other terms as "lessor," "lessee" and "rent."

"If the instrument styles itself a lease and employs words commonly found in leases, like lessor, lessee, etc., we have circumstances which indicate that the authors intended to create the relationship of landlord and tenant, but these circumstances are not controlling. (*Tiffany, Landlord and Tenant*, § 7, footnote 119). The courts construe the whole mass of words and not merely some of them."

(In this case the Court held the document denominated a lease to be only a license.) *Strandholm v. Barbey*, 145 Ore. 427 (441).

"In construing a written lease, the intent must be gathered from an examination of the whole instrument, and such a construction should be given it, if possible, as will render all its clauses harmonious, so as to carry into effect the actual purpose and intention of the parties as derived therefrom. To give such an instrument a narrow and technical interpretation is contrary to well-settled rules of construction." *Dellwo v. Edwards*, 73 Ore. 316, 323.

The foregoing was quoted with approval in the later case of *Buck v. Mueller*, 207 Ore. 169 (p. 173).

Applying the tests approved by the foregoing authorities to the contract of April 8, 1947 (Ex. 2-B), the conclusion is inescapable that an assignment was made by the Appellants of their leasehold estate to Pacific.

The first and principal test is whether or not the lessee has transferred his interest in the property for the entire period of his lease. (Exhibit 2-B covers precisely the same property covered by the original lease and for precisely the same period of time, both of them terminating on the same date by their specific provisions.) Probably the second most significant test is whether or not there was any reversion reserved to the original lessee. In this case there was not (Ex. 2-B, § 18). Another test suggested is the extent of the obligation assumed by the assignee. In the instant case the two documents are almost identical, paragraph by paragraph, condition by condition, which Pacific covenants directly with Sweeny to perform. Appellants are placed under no obligation to Sweeny. In this connection it is especially significant that the later contract (Ex. 2-B) provides that Pacific shall pay all of the rent to Sweeny instead of to Appellants as sublessors. This rental in the amount of \$1,900.00 per month replaced the rent reserved under the previous lease payable by Appellants (\$1,600.00 per month) to Sweeny. In these circumstances Pacific had no way of escaping full liability, either by abandoning the leased property or re-assigning. (*Barde v. Portland News Co.*, 152 Ore. 77, 82.)

When Sweeny, the owner of the fee, executed the new contract of April 8, 1947, leasing to Pacific the identical property covered by the earlier lease, for the identical period, under identical conditions, all of which the new lessee agreed to assume, including the payment of the original rental reserved under the initial lease, that initial lease was abrogated or absorbed (Tiffany,

Real Property, Sec. 124, p. 202, quoted *supra*). When Appellants joined in the execution of that document their interest passed completely to Pacific and became merged with the new leasehold estate. There can not be two subsisting leases to different persons on the same property, for the exact period of time, and under the same conditions. Furthermore, under the later document the Appellants were eliminated from any obligation or requirement. They were no longer obligated to pay any rent to the landlord nor perform any other duty. All they had to do was to receive from Pacific the payment to them of the monthly installments. After the execution of this later document Appellants retained absolutely nothing except a claim on Pacific for the payment of their monthly installments, installments on the purchase price for the assignment.

Appellants joined in the new lease of the property from Sweeny to Pacific in order to dispose of their leasehold estate. A parallel situation occurred in the case of *Walter H. Sutliff v. C.I.R.*, 46 B.T.A. 446, where a lessee joined in a deed from his landlord conveying the leased premises to a purchaser. Referring in its decision herein to the *Sutliff* case, the Tax Court said (R. 33):

"In *Walter H. Sutliff*, *supra*, the taxpayer as lessee joined with the owner in fee of the premises in a deed conveying the property to a purchaser. We there rejected the contention of the Commissioner that a portion of the consideration received by the taxpayer was a substitute for the rental payments which he might receive throughout the unexpired term of his lease, and held that he had disposed of his leasehold interest in the property and was entitled to report the proceeds as capital gain."

We have emphasized, perhaps over-emphasized, the Oregon decisions which establish clearly and firmly the propositions of law upon which Appellants' contentions are based, principally because the decision in the court below cited a repudiated Oregon decision as authority for a rule which does not prevail in Oregon as the basis for its erroneous decision. The Tax Court in its opinion pointed out Appellants' default in citing Oregon decisions in support of their contentions. It seemed advisable not to repeat this error.

FEDERAL AUTHORITIES

The decisions of the Federal Courts, both District and Appellate, seem clearly to establish the following propositions which support Appellants' contention and which are summarized below:

The proceeds from the sale or assignment of a leasehold estate are taxable as capital gains. *C.I.R. v. Ray*, 210 F.2d 390.

Also, payments for "vacating and surrendering the premises" (which was in fact accomplished here) have been held entitled to capital gains treatment on the theory that the transaction resulted in an assignment or sale. *C.I.R. v. Golonsky*, 200 F.2d 72; *C.I.R. v. McCue Bros.*, 210 F.2d 752. Indeed, the Tax Court itself has generally recognized this underlying principle. *Brecher v. C.I.R.*, 16 T.C. 469; *Ruwitch v. C.I.R.*, 22 T.C. 1053, and *Sutliff v. C.I.R.*, 46 B.T.A. 446 (1942).

In determining whether there has been a sale or an assignment of a leasehold estate, the designation of the

instrument or the language used therein is not conclusive of its true nature, but the Court will "consider the intent of the parties and the legal affect of the instrument as written." *Oesterreich v. C.I.R.*, 226 F.2d 798; *Benton et ux v. C.I.R.*, 197 F.2d 745; *Converse v. Earle*, U.S. Dist. Ct. of Oregon, Civ. No. 5778 (Aug. 9, 1951).

Neither is it material that the assignor was to receive the consideration in monthly or other periodic installments, or payments. *Brecher v. C.I.R.*, supra; *Jones v. U. S.*, 96 F. Supp. 973; *U. S. v. Jones*, 194 F.2d 783.

Landlord executing a new lease automatically releases the old lease and the original lessee, except as to such rights as are specifically reserved. *Jones v. Winchester*, 61 F.2d 774 (775).

" * * * If one other than the lessee is in possession of premises, paying rent, the law will presume that the lease of the property has been assigned to such person." *Northwestern Co. v. Security Co.*, 261 F. 575 (578).

(The foregoing is from a decision by this Court upon an appeal from a decision of the District Court of the United States for the District of Oregon.)

Great significance was attached to the use of the terms "lease," "lessor," "lessee," "rent," etc. by the trial judge, although neither the Commissioner nor the Tax Court adhere consistently to the erroneous proposition that the labels on a document control and determine its character, or that the use of terminology is decisive.

In the case of *H. T. Benton et ux v. C.I.R.*, 197 F.2d 745, the Commissioner and the Tax Court vigorously

contended that a "lease" with option to purchase executed by the taxpayer was, in fact, a contract of purchase, and that the rental payments provided for in the lease were not deductible as business expense. The Tax Court's decision sustained the Commissioner, on the so-called "economic theory" where the record showed the down payment provided for in the agreement was large enough, over and above normal depreciation, to give the purchaser an equity in the property. The Circuit Court of Appeals did not disapprove of this theory, but held that it had been misapplied to the facts. It said in part (p. 752):

"For the Commissioner and the Tax Court to decide solely by the application of an objective economic test that the taxpayer had an equity in the property, effectively begs the question to be decided, namely whether what was in form a lease was in substance and according to the real intention of the parties a conditional sale contract."

The Court of Appeals emphasized the necessity to make a realistic determination of the true nature of the agreement and the intent of the parties, and reversed the Tax Court decision.

In the United States District Court for the District of Oregon the Commissioner contended that the sale of logging machinery pursuant to a sales contract was not, in fact, a sale, and that the proceeds received therefrom was ordinary income and taxable as such.

Converse v. Hugh H. Earle, Collector of Internal Revenue, Civ. No. 5778, Aug. 9, 1951.

In a carefully reasoned decision in the United States District Court for the Western District of Virginia

(*Lemon v. U. S.*, 115 F. Supp. 573) the Court had before it a document denominated "lease and option," which provided for the rental of an airplane for a period of six months for \$14,000.00, with the option to purchase the airplane at the end of the period for an additional \$14,000.00. The Court nevertheless held the transaction to be a sale and the Court said in part (p. 576):

"The contract which gives rise to the controversy here is designated a 'Lease and Option' and its language bears out its title. But it is well-settled that the designation given the transaction is not conclusive of its true nature." (Citing authorities)

In the *Oesterreich* case referred to above, this Court of Appeals for the Ninth Circuit, made the following statement upon the proposition which lies at the basis of Appellants' contentions:

"There is only one issue presented in this case. Is petitioner entitled to treat 'rental' payments made by 'lessee' as long term capital gains or must she treat them as ordinary income? * * * *The courts, in making a determination of this sort, commonly consider the intent of the parties and the legal effect of the instrument as written.* * * * It seems well established that calling a transaction a 'lease' does not make it such, if in fact it is something else. To determine what it is, the Courts will look to see what the parties intended it to be. Both petitioners and Wilshire Holding Corp. have at all times referred to the agreement as a lease and they have treated the payments as rental income and rental expense, respectively. For this reason, perhaps, the tax court assumed that the parties intended a lease. However, the test should not be what the parties call the transaction nor even what they mistakenly believe to be the name of such transaction. What the parties believe the legal effect of such transaction to be should be the criterion. If the parties

entered into a transaction which they honestly believed to be a lease but which in actuality has all the elements of a contract of sale, it is a contract of sale and not a lease, no matter what they call it or how they treat it on their books. *We must look, therefore, to the intent of the parties in terms of what they intended to happen.*" (Emphasis supplied) (226 F.2d 798, p. 801)

The circumstance that Appellants were to receive payment of their part of the consideration in monthly installments during the balance of the original term of their first lease, would not affect the character of the transaction or disqualify it from capital gains treatment.

In the case of *Jones et al v. United States*, 96 F. Supp. 973, the Court had before it a situation in which plaintiff claimed capital gains treatment on his share of the net income from a franchise which had been assigned to his partner upon the dissolution of the partnership. These payments were made periodically throughout the entire balance of the franchise term. The District Court of Colorado rejected the Government's contention that the plaintiff had retained an interest in this asset, and that therefore the income he received was ordinary income and taxable as such. It entered judgment in favor of plaintiff for the refund due on the basis that these payments represented the consideration received by plaintiffs from the sale of an asset and were therefore entitled to capital gains treatment.

The United States Court of Appeals for the Tenth Circuit (*United States v. Jones, et al*, 194 F.2d 783) on review affirmed the District Court. The Court said (p. 785):

"The Collector contends that by the clear and unambiguous terms of the dissolution agreement Andy (Jones) retained his interest in the bus franchise and the Taylor lease until its expiration in 1946.*** The trial court found that by the terms of the dissolution agreement the parties intended that Durwood should become the absolute owner of the bus franchise * * * and concluded that the amounts received by Andy (Jones) during the taxable years in question were part of the purchase price provided for in the agreement and should be taxed as capital gains during the years which the payments were received. We conclude that the finding of the trial court that the transfer of the bus franchise constituted the sale of a capital asset is sustained by substantial evidence and that the judgment of the trial court is not clearly erroneous. (Authorities) * * *

"The judgment is affirmed."

The real intention of the parties here seems just as clear and positive as the foregoing applicable rules of law: Pacific desperately needed and bought outright Appellants' entire leasehold estate. Appellants sold out, got out and stayed out.

It is important to remember that this transaction was initiated by one Mr. Churchill Cook, the representative of Pacific, that he was looking for necessary space for that utility (R. 57).

Appellants were operating a cleaning establishment in the premises, had recently spent a substantial sum in improving the same for their use, and had purchased a quantity of expensive equipment, part of which they had not yet installed. They anticipated occupying the entire premises during the full balance of their term (R. 61).

The transaction which was consummated in the contract (Ex. 2-B), was initiated, according to the testimony of Mr. Cook, as follows:

"I walked in and introduced myself to him (Mr. Voloudakis) and asked him whether or not he would consider selling out and getting out." (R. 58)

This corroborated Appellants' statement on direct examination, as follows:

"Q. Now what were the circumstances surrounding your going out of possession, your vacating possession?

A. Well, the Telephone Company wanted to—they wanted to occupy the place—wanted to—wanted me to get out of there." (R. 47)

Appellants further testify that after the transaction was consummated, they vacated the premises completely and surrendered them to Pacific. That since that time they have had no dealings whatsoever with Sweeny, nor with Pacific, except to receive the monthly check. As Mr. Voloudakis stated at the close of the deal:

"I just put my coat on, cleaned up the place, and that's the last I've seen of it." (R. 48)

Pacific immediately took possession of the premises and spent a very substantial amount of money completely remodelling them to accommodate its accounting offices (R. 59). Indeed, the remodelling was so extensive that the property was suitable for no other occupancy except by Pacific (R. 59).

Exhibit 2-B seems to have been prepared by the agents of the owner, Sweeny, and the two letters, Exhibits N and O, were prepared by Pacific's agent, Mr.

Churchill Cook. Appellants were not in any way directly or indirectly responsible for the use of verbiage in any of these documents (R. 59, 60).

PENALTIES

Penalties assessed by Commissioner. A review of the pleadings and exhibits indicates that the Commissioner has assessed both a penalty for substantial understatement of estimated tax and in addition a penalty for failure to file a declaration of estimated tax. In other words, the Commissioner has assessed penalties under Section 294 (d) (1) of the Internal Revenue Code and penalties under Section 294 (d) (2) of the same Code. This is erroneous. The assessment of the six per cent penalty for substantial underestimation of estimated tax is improper for the reason that the tax was not underestimated. Indeed, it was not "estimated" at all. For holdings directly in agreement with Petitioners' argument, see *United States v. Risley*, 120 F. Supp. 530 at page 538 (DCND Ga. 1954); *Owen v. United States*, 134 F. Supp. 31 (DC Neb. 1955); and *Powell v. Granquist*, 146 F. Supp. 308 (DC Ore. 1956).

It seems particularly improper to make the penalty assessments above mentioned in this case for "substantial understatement of estimated tax" because it does not represent an understatement of the estimated tax at all, but rather an error made in good faith as to the basis upon which the tax should be estimated. The exact amount of the income and a precise computation of the tax were reported.

CONCLUSION

The three requisites to capital gains treatment exist in the instant case. Real property used in trade or business is an asset subject to capital gains treatment within the expressed terms of Section 117 (j) of the Internal Revenue Code of 1939. The courts have repeatedly held that a leasehold estate is such property. No contrary contention is made here.

It is stipulated that the Petitioners obtained the leasehold in question in 1946 and remained in possession for approximately a year. Thus the six months holding period required by the 1939 Code was complied with.

The transaction in 1947 (Ex. 2-B) constituted a sale or assignment of Appellants' leasehold interest to Pacific for the following reasons: (1) Appellants sold and relinquished to Pacific every shred of interest or claim they had in or to the property, their entire leasehold estate; (2) Pacific acquired and retained for the full balance of the original lease period all of the rights of Appellants in the leased property; (3) All of Appellants' obligations under the original lease as lessee were abrogated by the execution of the new lease between the owner and Pacific covering exactly the same property and for precisely the same period; and (4) Appellants retained no reversionary rights or interests in said property whatsoever.

Thus the payments to Petitioners from Pacific were correctly reported as long-term capital gain and the Petitioners owe no additional tax on said payments.

The Commissioner was also incorrect in assessing penalties for all of the tax years in question under both Section 294 (d) (1) and Section 294 (d) (2) of the Internal Revenue Code.

Respectfully submitted,

MCDANNELL BROWN,
Attorney for Petitioners.

**In the United States Court of Appeals
for the Ninth Circuit**

**STEVEN VOLOUDAKIS and KATHERINE VOLOUDAKIS,
PETITIONERS**

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

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DEC 10 1958

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 16,092

**STEVEN VOLOUDAKIS and KATHERINE VOLOUDAKIS,
PETITIONERS**

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 23-39) are reported at 29 T.C. 1101.

JURISDICTION

The petition for review (R. 40-43) involves deficiencies in federal income taxes and additions to tax for the years 1949 to 1953 inclusive in the following amounts (R. 40):

Additions to Tax

Year	Deficiency	Sec. 291(a)	Sec. 294(d)		Sec. 294(d)		Sec. 294(d)	
			(1)	(A)	(1)	(B)	(2)	(2)
1949	\$1,868.66	\$ 467.16	-----		\$ 4.00		\$ 145.95	
1950	3,241.66	-----	\$387.47		-----		258.31	
1951	3,635.80	-----	-----		52.50		261.78	
1952	4,093.68	1,023.44	-----		75.00		254.63	
1953	5,899.84	-----	-----		97.50		397.64	
	<u>\$18,739.64</u>	<u>\$1,490.60</u>	<u>\$387.47</u>		<u>\$229.00</u>		<u>\$1,318.31</u>	

Taxpayers' income tax returns for the years 1949 to 1953 inclusive were filed with the Director of Internal Revenue for the District of Oregon. On February 21, 1956, the District Director mailed the taxpayers a notice of deficiency in the total amount of \$18,739.64, plus additions to tax totalling \$3,425.38. (R. 7-17.) On the ninetieth day thereafter and on May 21, 1956, taxpayers filed a petition with the Tax Court for a redetermination of the deficiencies under the provisions of Section 272 of the Internal Revenue Code of 1939. (R. 3-17.) The decision of the Tax Court was entered March 18, 1958. (R. 39-40.) The case is brought to this Court by a petition for review filed June 11, 1958. (R. 40-43.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Did amounts received by the taxpayers during the taxable years under the terms of a lease agreement constitute proceeds from the sale of a leasehold resulting in long-term capital gain under Section 117(j) of the Internal Revenue Code of 1939, as

contended by the taxpayers, or were such proceeds ordinary rental income taxable under Section 22(a) of the Internal Revenue Code of 1939, as held by the Tax Court?

2. Where taxpayers filed no declaration of estimated tax for 1950 and failed to pay installments due on declarations of tax filed for the years 1949, 1951, 1952 and 1953, were penalties correctly imposed under Section 294(d) (1) (A) and (B) of the Internal Revenue Code of 1939 and also under Section 294(d) (2) for substantial underestimation of estimated tax for the same taxable years?

STATUTE AND REGULATIONS INVOLVED

The applicable provisions of the statute and Regulations are printed in the Appendix, *infra*.

STATEMENT

A portion of the facts was stipulated. (R. 19-23.) The findings of the Tax Court (R. 24-32) may be summarized as follows:

During the years in issue, taxpayers, as partners, owned a dry-cleaning establishment doing business as Stevens Cleaners and Hatters. In addition, the taxpayer husband also owned 99.6 per cent of the outstanding stock of Stevens Cleaners, Inc., an Oregon corporation engaged in the dry-cleaning and used clothing business. Prior to 1946, he conducted his cleaning, dyeing, and laundry operations at 1334 S. W. Morrison Street, Portland, Oregon, occupying approximately one-eighth of the premises known as the Sweeny Building or the Sweeny Block. (R. 25.)

On March 5, 1946, taxpayers executed a lease with the Sweeny Investment Company (hereinafter referred to as Sweeny), owner of the Sweeny Building, for the entire premises comprising the Sweeny Block, subject only to a prior lease to Robert Pantley of a portion of the premises. The lease to Robert Pantley had approximately 6 months to run. The lease executed by Sweeny and taxpayers was for a term of 10 years commencing with the surrender of the premises by all previous tenants except Robert Pantley. The rental provided in the lease was \$1,600 per month, payable on the first day of each calendar month. The lease contained the standard provisions normally appearing in leases of business property concerning such matters as the maintenance and alteration of the premises, the liability of the lessee for negligence, destruction of the premises, insurance, assignment and subletting, etc. Taxpayers occupied the entire premises pursuant to the lease of March 5, 1946, made certain improvements on the property and operated a cleaning establishment there for approximately 1 year. (R. 25-26.)

Meanwhile, Pacific Telephone and Telegram Company (hereafter referred to as Pacific) was attempting to locate available office space in the downtown Portland area, and retained Churchill Cook, a realtor, as its agent for this purpose. Churchill Cook contacted the taxpayer husband regarding the need of Pacific for additional space and negotiations for the entire Sweeny Block ensued. On January 17, 1947, the taxpayer husband signed and sent the following letter to Cook (R. 26-28):

Reference is made to our current conversation relative to your procuring for me a sub-tenant who will sub-lease the entire premises known as the Sweeney Block, said premises being further described as the one story building situated on Lots numbered 1 to 8 inclusive in Block South half (S $\frac{1}{2}$) of K in Portland, Oregon, and on which premises I hold a lease expiring in May 1956.

In connection therewith, I agree to vacate and to sub-lease the entire premises in an "as is" condition for the full term of my lease at and for a gross rental at the rate of \$50,000 per year, which rental is to be paid in monthly installments of $\frac{1}{12}$ th each month, beginning with the date that the premises are vacated by the undersigned, which will be sixty (60) days from the date of the execution of the lease.

It is further agreed that your prospective tenant at the time of executing said lease will deposit with me the sum of \$35,000.00, which deposit shall represent a partial payment of rent in the amount of \$1500.00 per month for the first 24 months of said lease. While an advance rental at the rate of \$1500.00 per month would equal the sum of \$36,000.00, the \$35,000 so paid represents this amount less \$1000.00 interest deducted therefrom for the usage of same. The balance of the rental due during the first 24 month shall be paid in monthly installments of \$2666.00.

I further agree to vacate 75% of the entire premises within sixty (60) days after the date of the execution of said lease and further agree that the remaining 25% of said premises will be vacated not later than July 30th, 1947.

This agreement shall be valid until February 28th, 1947 in order to permit you and your principals time to accomplish the necessary arrangements to conclude the sub-lease.

This agreement is predicated on the understanding that your principals have viewed the property, have expressed their interest in sub-leasing said premises and that the proposed sub-tenant is a national concern rated at better than One million dollars.

It is further understood and agreed that whereas the undersigned entered into a lease of the above mentioned property in March, 1946, with the Sweeney Investment Company, a corporation and it is provided in said lease that the same shall not be sub-let or assigned without the written consent of the lessor, Sweeney Investment Company; that this agreement is made contingent upon getting such consent; and if the undersigned is not able to secure said consent, or if the lessor refuses to give its written consent, this entire agreement shall be null and void; and it is further understood and agreed that the parties to whom the undersigned sub-lets or assigns their rights in the lease to this property will, in occupying and using said property, comply with and assume the obligations of the undersigned regarding the occupancy and use of said property, as contained in said lease from the Sweeney Investment Company to undersigned.

The foregoing letter was drafted by Churchill Cook for the purpose of committing taxpayers to an offer. (R. 28.) On April 7, 1947, the taxpayers signed and sent the following letter, drafted by Churchill Cook, to Pacific (R. 28-29):

Reference is made to our lease agreement wherein you are leasing the entire one story building situated on Block (S 1½) "K" in Portland, Oregon.

In connection therewith and with specific attention to the advance rental in the amount of \$35,000, to be paid at the time of consummating this lease, please be advised this will authorize and request you to pay directly to G. C. COOK the sum of \$10,500 from the advance rent to be paid me at that time, said payment to G. C. Cook being payment in full for his services in connection therewith.

Negotiations between the parties culminated on April 8, 1947, with the consent of Sweeny, the original lessor, as required by the lease executed March 5, 1946, and with the execution of a three-way agreement by Sweeny, Pacific, and taxpayers. The agreement, dated April 8, 1947, was for a term of 9 years (the remainder of the unexpired term under the lease of March 5, 1946) commencing with the surrender of 70 per cent of the premises. The rental to be paid by Pacific was \$50,000 per year, payable monthly at the rate of \$1,900 to Sweeny and \$2,266.67 to taxpayers. (R. 29.) The agreement describes taxpayers as lessors and Pacific as lessee, and contains the following provisions (R. 29-30):

WHEREAS, the Lessee desires to lease said premises;

NOW, THEREFORE, for and in consideration of the covenants and agreements of the parties hereto as hereinafter set forth, it is hereby agreed as follows:

1. The Lessors hereby lease to the Lessee all of the property above described for a term of nine (9) years commencing on the date when possession of at least seventy per cent of said premises is delivered to the Lessee, which date shall be not later than May 1, 1947. * * *

* * * *

22. If the Lessee shall fail to pay any rent or other payments provided for in this lease, or if the Lessee shall default in the performance of any of its covenants in this lease, and if such default is not remedied within thirty (30) days after written notice thereof, Lessors without further notice or demand may enter upon and repossess the premises and expet [*sic*] the Lessee and those claiming under it and remove its effects without being deemed guilty of trespass and without prejudice to any remedies which may be used for arrears of rent or preceding breach of covenant.

In accordance with the provisions of the foregoing agreement the premises were vacated by taxpayers and possession was taken by Pacific. The agreement expired by its terms on or about May 1, 1956. Pacific negotiated a new lease directly with Sweeny for possession of the premises after May 1, 1956. (R. 30.)

The payments made by Pacific to taxpayers under the agreement of April 8, 1947, aggregated \$237,130.41. The amounts received by taxpayers under the agreement of April 8, 1947, were reported by taxpayers on their partnership returns as long-term capital gains resulting from an installment sale, with the following explanation of the transaction appended (R. 30-31):

On April 8, 1947, taxpayer entered into an agreement with the Pacific Telephone and Telegraph Company, whereby the company would purchase the taxpayer's interest in the property leased by the taxpayer from Sweeney Investment Co., Spokane, Washington. Taxpayer had previously entered into a lease on March 1, 1946 for a period of ten years with Sweeney Investment Co. for the property which was now made available to the Pacific Telephone and Telegraph Co., for a total price of \$237,130.41 which payments are to be made by that company to the taxpayer from April 8, 1948 to March 6, 1956. This transaction constitutes a sale of the original lease with the profit being reported on the installment plan as less than 30% of the sales price was received during the initial year 1947.

The amounts reported by taxpayer as payments received from Pacific during the years in issue were as follows (R. 31):

Year	Amount received	Gain as computed on returns	Taken into account on joint return, 50 per cent as long- term capital gains
1949	\$21,200.04	\$16,785.21	\$ 8,392.60
1950	27,200.04	21,535.73	10,767.86
1951	27,200.04	21,535.73	10,767.87
1952	27,200.04	21,535.73	10,767.87
1953	27,200.04	21,641.99	10,821.00

The Commissioner determined that the foregoing amounts represented rental income rather than proceeds of an installment sale of taxpayers' leasehold, and allowed amortization of certain leasehold improvements and of commissions and legal fees. (R. 31.) The Commissioner accordingly determined tax-

payers' net rental income for each of the years in issue to be as follows (R. 32) :

<u>Year</u>	<u>Gross rent received</u>	<u>Allowable amortization</u>	<u>Net rent</u>
1949	\$21,200.04	\$5,063.15	\$16,136.89
1950	27,200.04	5,063.15	22,136.89
1951	27,200.04	5,063.15	22,136.89
1952	27,200.04	5,063.15	22,136.89
1953	27,200.04	5,063.15	22,136.89

The Tax Court held that the agreement of April 8, 1947, was a sublease and not an assignment, and therefore that the payments received were taxable as ordinary income under Section 22(a) of the Internal Revenue Code of 1939 rather than as capital gain under Code Section 177(j). (R. 32-38.) The Tax Court also held that the Commissioner properly imposed additions to tax under both Sections 294(d) (1) and (2) for the same years. (R. 38-39.)

SUMMARY OF ARGUMENT

1. The Tax Court correctly held that amounts received by taxpayers during the taxable years 1949-1953 constituted rentals taxable as ordinary income under Section 22(a) of the Internal Revenue Code of 1939 and not proceeds from the sale of a leasehold taxable as capital gain under Code Section 117(j). Whether a transaction is a lease or a sale is determined by the intention of the parties to the instrument, and the courts will look to this intent to determine the legal effect of the transaction. Here the intention of the parties as expressed in the plain and unambiguous language of the instrument was to lease

and not to sell. The instrument recognized the continuing existence of the earlier 10-year lease to the taxpayers, repeatedly referred to the payments to taxpayers as rental, referred to taxpayers as lessors and to Pacific as the lessee. Taxpayers retained the right of re-entry for default by the lessee of any covenant in the lease, a provision entirely consistent with a landlord and tenant relationship. Under the instrument in question the lessee assumed an entirely different obligation with respect to the amount of rental payments than taxpayers had assumed under the earlier lease. Taxpayers did not testify that they intended a sale, only that the transaction involved a vacation of the premises. Correspondence before execution of the lease in question confirms an intent to lease rather than sell. No intention is shown anywhere in the record to substitute the sublessee for the taxpayers in the earlier lease so as to effect an assignment.

Even assuming as taxpayers contend that the agreement in question effected a termination of their interest and substitution of Pacific as lessees, that would not render the transaction a "sale". As this Court recently held (*Leh v. Commissioner*, decided October 17, 1958), a surrender of a contractual right is not a "sale" for capital gain purposes.

The facts of the instant case are distinguishable from those in cases where a lessee sells, transfers or relinquishes leasehold rights for a stated consideration, under a written instrument showing an intention to transfer or sell a lessee's rights absolutely. The common law principle is inapplicable here that where a lessee transfers all of his rights and obliga-

tions under a lease for the remaining time of the lease the transfer is regarded as an assignment rather than ~~an~~ sublease. In the first place, the record is not conclusive that taxpayers did transfer the entire unexpired term of their original lease. The expiration date of the earlier 10 year lease does not coincide with the 9-year lease involved here. Moreover, even if taxpayers had transferred the entire term of their lease, that in itself would not create a sale where, as here, the record shows a clear intention to lease rather than sell. Inasmuch as the record shows that the payments were intended to be rental payments, they are fully taxable as ordinary income under Section 22(a) of the Internal Revenue Code of 1939 rather than at capital gains rates.

2. The Tax Court properly held that taxpayers were subject to additions to tax for substantial underestimation of estimated tax under Section 294(d)(2) of the Internal Revenue Code of 1939 as well as to additions to tax under Code Sections 291(a), and 294(d)(1)(A) and (B). That more than one addition to tax may be imposed for the same taxable year has been decided by this Court and by at least two other Circuit Courts. Moreover, there is no merit to the contention that the additions to tax for substantial underestimation should be excused because of alleged good faith. That penalty is not subject to a reasonable cause limitation, or to any other defense. The language of the Code sections involved, the legislative history of their enactment and the applicable Treasury Regulations all show a clear intent that the several additions to tax may be imposed for the same taxable year.

ARGUMENT

I

The Tax Court Correctly Held That Amounts Received By Taxpayers During The Taxable Years Constituted Rentals Taxable As Ordinary Income Under Section 22(a) Of The Internal Revenue Code Of 1939 And Not Proceeds From The Sale Of A Leasehold Taxable As Capital Gain Under Code Section 117(j)

The principal issue in this case is whether certain payments to taxpayers in 1949 to 1953 under the lease agreement of April 8, 1947, constituted rental payments taxable as ordinary income under Section 22(a) of the Internal Revenue Code of 1939 (Appendix, *infra*), as the Tax Court held (R. 32-38) or whether these payments were proceeds of a sale by taxpayers of their leasehold, taxable at capital gains rates under Code Section 117(j) (Appendix, *infra*), as taxpayers contend (Br. 12-28). It is submitted that the Tax Court correctly held that these payments were rental payments, fully taxable as ordinary income in the years involved.

Section 22(a) of the 1939 Code defines gross income as including, among other things, all income from "sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, * * * or gains or profits and income derived from any source whatever". Whether a particular transaction is a lease or a sale is determined by the intention of the parties to the instrument, and the courts will look at this intent to determine the legal effect of the transaction. *Haggard v. Commissioner*, 241 F. 2d 288 (C.A. 9th); *Oesterreich v. Commis-*

sioner, 226 F. 2d 798 (C.A. 9th); *Watson v. Commissioner*, 62 F. 2d 35 (C.A. 9th). As the Court stated in its *Oesterreich* opinion, *supra*, p. 803, "The intention of the parties, as expressed in the instrument, was cardinal * * *. In construing a written lease, the intent of the parties must be gathered from an examination of the whole instrument, and a construction should be given, if at all possible, which will render all clauses harmonious so as to carry into effect the actual purpose and intention of the parties. *Buck v. Mueller*, 207 Ore. 169, 293 P. 2d 736, certiorari denied, 352 U.S. 895.

Here, looking at the instrument of April 8, 1947, as well as all other circumstances disclosed in the record bearing on the parties' intent, the instrument (Ex. 2-B, R. 20, 68) was exactly what it purported to be—a lease. It recites clearly that taxpayers were the owners of a leasehold interest, recognizing the continuing existence of the ten-year lease between taxpayers and Sweeny executed the previous year (Ex. 1-A, R. 19-20, 68). It repeatedly refers to the payments from Pacific to taxpayers as "rental", stating that the rental was payable to the taxpayers monthly from the date possession of 70% of the premises was delivered, but not later than May 1, 1947, for nine years thereafter. There are numerous references to "this lease", to taxpayers as "Lessors" and to Pacific as "Lessee", paragraph 1 beginning, "The Lessors hereby lease to the Lessee all of the property above described for a term of nine (9) years * * *". Thus the language of the agreement points to the execution of a lease, and not to a sale. The language used in the instrument is plain and unam-

biguous, and shows that the parties recognized that the original lease continued in existence for the duration of its term. There is a complete lack of any language in the instrument or circumstance in the record tending to show that taxpayers were selling their leasehold or that they or Pacific intended a sale. By paragraph 22 taxpayers retained the right of reentry for a default by the lessee of any of the covenants in the lease, with the provision that if the default was not remedied within 30 days after written notice the taxpayers as lessors could enter and repossess the premises and expel the lessee. As the Tax Court pointed out (R. 34), this provision is entirely consistent with a landlord and tenant relationship.

Under the April 1947 agreement the lessee assumed entirely different obligations with respect to the amount of rental payments than taxpayers had assumed under the 1946 lease. Moreover, the original lease had required taxpayers as lessees to carry public liability insurance for the benefit of Sweeny, whereas the 1947 lease did not require the lessee to carry similar insurance. Under paragraph 21 of the 1947 lease, Pacific incurred an obligation relating to possible increases in property taxes, an obligation not assumed by the taxpayers under the original lease. Paragraph 6 of the 1947 lease recognized the continuing obligation of taxpayers to carry fire insurance on the property. There is nothing in form or substance to indicate that the earlier lease was being *assigned* to Pacific. Voloudakis did not testify that he intended a sale. His testimony was vague and unresponsive,

and the most he could say, when asked if he thought he was selling something to Pacific, was that the transaction was "Just vacate my premises". (R. 51.) Merely vacating the premises does not, of course, operate *per se* to make the transaction a sale, for the surrender of possession is as much an incident of a lease or sub-lease as it is of a sale or exchange.

In the negotiations preceding the lease, the intention of the parties to lease rather than sell was also made clear. In his letter of January 17, 1947 (Ex. N, R. 26-28, 54, 68), Voloudakis offered Churchill Cook "to vacate and to sub-lease the entire premises in an 'as is' condition for the full term of my lease at and for a gross rental at the rate of \$50,000 per year, which rental is to be paid in monthly installments of 1/12th each month, * * *"; and in taxpayers' letter of April 7, 1947, to Pacific (Ex. O, R. 28-29, 56, 68) they referred to "our lease agreement wherein you are leasing the entire one story building * * *" and suggested the payment of "advance rental" of \$35,000 in consideration of which the lease stated (paragraph 2(c)) the lessee "shall be entitled to a credit upon the amount of rental accruing to Voloudakis of Fifteen Hundred Dollars (\$1500) per month during the first twenty-four months of this agreement." From this correspondence it is obvious that taxpayers intended at all times to create a relationship of landlord and tenant with Pacific, and not to sell their leasehold interest.

There is nothing in the record to indicate that the parties to the April 8, 1947, agreement did or intended to eliminate taxpayers and to substitute

Sweeny in their place so as to effect an assignment of the 1946 lease. In the absence of anything in the record to show that the parties intended the contract to be a sale, the Tax Court was clearly correct in concluding that it was simply what it purported to be, a subleasing of the premises from taxpayers to Pacific.

Taxpayers rely on cases holding that payments received by a lessee in return from the cancellation or surrender of a leasehold interest are considered as being for the "sale" of a capital asset and may be reported as capital gain rather than ordinary income. See *Commissioner v. McCue Bros. & Drummond, Inc.*, 210 F. 2d 752 (C.A. 2d), certiorari denied, 348 U.S. 829; *Commissioner v. Ray*, 210 F. 2d 390 (C.A. 5th), certiorari denied, 348 U.S. 829; *Commissioner v. Golonsky*, 200 F. 2d 72 (C.A. 3d), certiorari denied, 345 U.S. 939; *Sutliff v. Commissioner*, 46 B.T.A. 466, but see *Leh v. Commissioner*, decided October 17, 1958 (2 A.F.T.R. 2d 5960). However, as the Tax Court pointed out (R. 32-36) those cases are clearly distinguishable from the instant case. In each of those cases there was a clear intention that the lessee sell, transfer or convey leasehold rights for a stated consideration under a written instrument which showed the intention of the parties was absolutely to transfer or sell the lessee's rights to the leasehold. As has been shown, there is nothing in the record here to show such an intention. Moreover, in those cases the consideration received by the lessee for the sale of the leasehold interest was in the form of a lump sum payment, whereas here the tax-

payers received rental payments in equal monthly installments over a 9-year period. Also cf. *Beus v. Commissioner* (C.A. 9th), decided November 3, 1958 (2 A.F.T.R. 2d 6134); *Commissioner v. Remer* (C.A. 8th), decided November 5, 1958 (2 A.F.T.R. 2d 6034); *Waller v. Commissioner*, 40 F. 2d 892 (C.A. 5th), certiorari denied, 282 U.S. 889; and *Robinson v. Elliot* (Mont.), decided October 31, 1957, pending on appeal to C.A. 9th, Nos. 15,983 and 15,784.

Taxpayers rely on the principle that at common law where a lessee transferred all of his rights and obligations under a lease for the remaining time of the lease, and retained no reversionary interest the transfer was regarded as an assignment rather than a sublease. (Br. 12-20.) That principle, however, has no application here. In the first place, there is no showing in the record that taxpayers did transfer the entire unexpired term of their original lease. There is evidence that the 1947 lease expired May 1, 1956, but no evidence as to the beginning date and hence the expiration date of the 1946 lease. Admittedly the 1946 lease provided for a term of 10 years, but the term was not to begin until the day when former tenants of Sweeny vacated the premises, a date not ascertainable from the evidence. According to the evidence, a 60-day notice to vacate was served on at least one of the tenants, and Voloudakis admitted in his testimony that the former tenants of Sweeny continued in possession of their space "until their time was up. They had about a six months lease." (R. 63.) There was no other evidence adduced in respect to the beginning date of the 1946

lease, and it is impossible, therefore, to determine when the term ended. The best estimate, in view of the evidence, is that the 10 year term of the 1946 lease would not have expired much sooner than August or September of 1956, which does not coincide with the 9 year term of the 1947 lease admittedly expiring on May 1, 1956. The evidence refutes rather than supports the contention that the taxpayers leased the whole unexpired term to Pacific.

Other evidence possibly bearing on this point, namely, the explanation given by the taxpayers when reporting the payments received under the lease of April 8, 1947, adds to the confusion. According to this evidence, the payments to be received under the lease aggregated \$237,130.41, the so-called "contract price" (Ex. 8-H to 12-L, inclusive, R. 22, 30-31, 68). On this basis, using the schedule of monthly payments under the lease, the last payment seems to fall on or about February 1, 1956, which leaves the interval from that date to May 1, 1956, the admitted expiration date of the lease, unexplained in the record.

However, assuming that taxpayers did transfer the entire term of their lease to Pacific, that in itself does not create an assignment where, as here, the facts and circumstances clearly show a sublease was intended. See *Douglas Properties, Inc. v. Commissioner*, 21 B.T.A. 347. Although admitting that there is no Oregon case squarely in point, taxpayers rely on Oregon cases (Br. 16-19) for the principle that, when one other than a lessee is in possession of leased premises, it is presumed that the lease has been

assigned to him. This presumption, however, can be rebutted where, as here, the intention of the parties is clearly to sublease rather than to sell. See *Quine v. Sconce*, 209 Ore. 486, 306 P. 2d 420. This Court so held in *Northwestern Mut. Life Ins. Co. v. Security S. & T. Co.*, 261 Fed. 575. Moreover, there is no merit to taxpayers' attempt to discredit the Tax Court for allegedly incorrectly relying on the case of *Moline v. Portland Brewing Co.*, 73 Ore. 532, 144 Pac. 572. Whether or not an *assigning* lessee remains liable to the landlord for rent or for the performance of any of the covenants of a lease is not before this Court, and the Tax Court's statement with respect thereto was only dictum. In the instant case, the parties did not eliminate the taxpayers and substitute Sweeny in their place as in an assignment, and taxpayers remained liable on their 1946 lease during its term.

The intention of the parties as shown by the record is clear that the payments here in question were rental payments, and not proceeds from the sale of taxpayers' leasehold, and, therefore, that the payments were fully taxable as ordinary income under Section 22(a) of the Internal Revenue Code of 1939 rather than at capital gains rates.

In any event, even assuming as taxpayers contend (Br. 11, 19-20) that the tripartite agreement had the effect of completely terminating taxpayers' interest and substituting Pacific as lessee, it still would not follow (as taxpayers further assume) that the transaction must be viewed as a "sale or exchange" for capital gain purposes. As this Court recently held in a case involving a similar issue (*Leh v. Com-*

missioner, decided October 17, 1958 (2 A.F.T.R. 2d 5960), the surrender or elimination of a contractual right by a taxpayer is not tantamount to a "sale", so as to entitle the taxpayer to treat the consideration received for the surrender as capital gain. In the words of this Court in the *Leh* case, the "principal object, result and 'effect' [of the transaction] was to terminate rights, not continue them, nor transfer them—nor sell them—nor exchange them." See also *Commissioner v. Pittston Co.*, 252 F. 2d 344 (C.A. 2d), certiorari denied, 357 U.S. 919. Moreover, as the Tax Court noted (R. 35-36), the instant case presents an *a fortiori* situation for denying preferential capital gain treatment to the consideration received, since the consideration was here received as "rental" over a period of many years rather than in a lump sum in a single taxable year. The capital gain provisions of the taxing statute were designed to afford relief in cases where appreciation in the value of a capital asset over a number of years is realized in a single taxable year, by way of a sale or exchange of the asset, and they are to be strictly construed. See *Burnet v. Harmel*, 287 U.S. 103, 106; *Corn Products Co. v. Commissioner*, 350 U.S. 46, 52; *Commissioner v. P. G. Lake, Inc.*, 356 U.S. 260, 265. This is not such a case.

II

The Tax Court Properly Held That Taxpayers Were Subject To Penalties For Substantial Underestimation Of Estimated Tax Under Section 294(d) (2) Of The Internal Revenue Code Of 1939

Taxpayers' returns for 1949 and 1952 were not filed in time, and additions to tax for those years

were assessed under Section 291(a) of the Internal Revenue Code of 1939. They did not file a declaration of estimated tax for the year 1950, and consequently the Commissioner assessed an addition to tax for that year under Code Section 294(d)(1)(A) (Appendix, *infra*). Moreover, they failed to pay installments due on the declarations of estimated tax filed for 1949, and 1951-1953, within the time prescribed by law, and additions were assessed under Code Section 294(d)(1)(B) (Appendix, *infra*), for those years. (R. 9, 24.) The taxpayers do not contest the imposition of these penalties, but contend (Br. 28) that the assessment of additions to tax under Section 294(d)(2) for substantial underestimation of tax for 1949-53 (R. 9, 24) was improperly sustained by the Tax Court (R. 38-40).

Taxpayers apparently argue, first, that it was erroneous to assess additions under both Code Section 294(d)(1) and (2); and, second, that they should be excused from additions for substantial underestimation in any event because the underestimation was made in good faith. It is submitted that neither argument has merit.

That both additions to tax may be imposed for the same taxable year was recently decided by this Court in *Hansen v. Commissioner*, 258 F. 2d 585, certiorari pending on another issue, which is controlling here; see also *Erwin v. Granquist*, (Ore.), decided May 10, 1957 (1957 P-H, par. 72,786, affirmed *per curiam*, 253 F. 2d 26 (C.A. 9th); *Patchen v. Commissioner*, 258 F. 2d 544 (C.A. 5th); *Abbott v. Commissioner*, 253 F. 2d 537 (C.A. 3d); *Kaltreider*

v. *Commissioner*, 255 F. 2d 833 (C.A. 3d); *Fuller v. Commissioner*, 20 T.C. 308, affirmed on other issues, 213 F. 2d 102 (C.A. 10th); see Treasury Regulations 118, Section 39.294-1(b) (3) (a) (Appendix, *infra*); S. Rep. No. 221, 78th Cong., 1st Sess., p. 42 (1943 Cum. Bull. 1283, 1345); H. Conference Rep. No. 510, 78th Cong., 1st Sess., p. 56 (1943 Cum. Bull. 1351, 1372); cf. *Acker v. Commissioner*, 258 F. 2d 568 (C.A. 6th), rehearing denied, September 3, 1958 (2 A.F.T.R. 5658), petition for certiorari pending.

Contrary to taxpayers' contention (Br. 28), there is nothing in the language of Code Section 294(d) (2) which would excuse a taxpayer from additions to tax for substantial underestimation because of alleged good faith. Similar contentions were rejected in *Kaltreider v. Commissioner*, *supra*; *Clark v. Commissioner*, 253 F. 2d 745 (C.A. 3d); and *Bouche v. Commissioner*, 18 T.C. 144; see also *Patchen v. Commissioner*, *supra*. As the Third Circuit stated in *Kaltreider v. Commissioner*, *supra* (p. 839):

The penalty for substantial underestimation of estimated tax under Section 294(d) (2) is not subject to a reasonable cause limitation, nor indeed to any other defense.

We submit that in sustaining the additions to tax the Tax Court was fully in accord with the language of Section 294(d) (1) and (2), with the legislative history of the section's enactment, and with the applicable Treasury Regulations, all of which show a clear intent that the several additions to tax may be imposed for the same taxable year.

CONCLUSION

For the reasons stated, the decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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DECEMBER, 1958.

APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition*.—"Gross income" includes gains, profits and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) [as amended by Sec. 210(a) of the Revenue Act of 1950, c. 994, 64 Stat. 906]¹ *Definitions*.—As used in this chapter—

(1) *Capital assets*.—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include—

(A) stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of

¹ The provisions of Section 117(a)(1) of the Internal Revenue Code of 1939 prior to this amendment, applicable for the taxable years 1949 and 1950, are substantially the same.

the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business;

(B) property, used in his trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), or real property used in his trade or business;

* * * *

(j) [as added by Sec. 151(b) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Gains and Losses from Involuntary Conversion and from the Sale or Exchange of Certain Property Used in the Trade or Business.*—

(1) *Definition of property used in the trade or business.*—For the purposes of this subsection, the term “property used in the business” means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), held for more than six months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business.

* * * *

(26 U.S.C. 1952 ed., Sec. 117.)

SEC. 294 [As amended by Section 118(a), Revenue Act of 1943, c. 63, 58 Stat. 21; Sections 6(b)

(8), and 13(b) of the Individual Income Tax Act of 1944, c. 210, 58 Stat. 231; Section 2, Act of January 2, 1951, c. 1195, 64 Stat. 1136; and Section 103(b), Revenue Act of 1951, c. 521, 65 Stat. 452]. ADDITIONS TO THE TAX IN CASE OF NONPAYMENT.

(d) *Income Tax.*—

(1) *Failure to file declaration or pay installment of estimated tax.*—

(A) *Failure to File Declaration.*—

In the case of a failure to make and file a declaration of estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due to reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of each installment due but unpaid, and in addition, with respect to each such installment due but unpaid, 1 per centum of the unpaid amount thereof for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment. For the purposes of this subparagraph the amount and due date of each installment shall be the same as if a declaration had been filed within the time prescribed showing an estimated tax equal to the correct tax reduced by the credits under sections 32 and 35.

(B) *Failure to Pay Installments of Estimated Tax Declared.*—Where a declaration of estimated tax has been made and filed within the time prescribed or where a declaration of estimated tax has been made and filed after the time prescribed and the Commissioner has found that failure to make and file such declaration within the time prescribed was due to reasonable cause and not to willful neglect, in the case of a failure to pay an installment of the estimated tax within the time prescribed, unless such failure is shown to the satisfaction of the Commissioner to be due ~~on~~ reasonable cause and not to willful neglect, there shall be added to the tax 5 per centum of the unpaid amount of such installment, and in addition 1 per centum of such unpaid amount for each month (except the first) or fraction thereof during which such amount remains unpaid. In no event shall the aggregate addition to the tax under this subparagraph with respect to any installment due but unpaid, exceed 10 per centum of the unpaid portion of such installment.

(2) *Substantial underestimate of estimated tax.*—If 80 per centum of the tax (determined without regard to the tax (determined without regard to the credits under sections 32 and 35), in the case of individuals other than farmers exercising an election under section 60(a), or 66 $\frac{2}{3}$

per centum of such tax so determined in the case of such farmers, exceeds the estimated tax (increased by such credits), there shall be added to the tax an amount equal to such excess, or equal to 6 per centum of the amount by which such tax so determined exceeds the estimated tax so increased, whichever is the lesser. This paragraph shall not apply to the taxable year in which falls the death of the taxpayer, nor, under regulations prescribed by the Commissioner with the approval of the Secretary, shall it apply to the taxable year in which the taxpayer makes a timely payment of estimated tax within or before each quarter (excluding, in case the taxable year begins in 1943, any quarter beginning prior to July 1, 1943) of such year (or in the case of farmers exercising an election under section 60(a), within the last quarter) in an amount at least as great as though computed (under such regulations) on the basis of the taxpayer's status with respect to the personal exemption and credit for dependents on the date of the filing of the declaration for such taxable year (or in the case of any such farmer, or in case the fifteenth day of the third month of the taxable year occurs after July 1, on July 1 of the taxable year) but otherwise on the basis of the facts shown on his return for the preceding taxable year. In the case of taxable years beginning prior to October 1, 1950, and ending after September 30, 1950, the additions to tax prescribed by this subsection shall not be applicable if the taxpayer failed to meet

the 80 per centum and 66 $\frac{2}{3}$ per centum requirements of this paragraph by reason of the increase in normal tax and surtax on individuals imposed by section 101 of the Revenue Act of 1950. In the case of taxable years beginning prior to November 1, 1951, and ending after October 31, 1951, the additions to tax prescribed by this subsection shall not be applicable if the taxpayer failed to meet the requirements of this paragraph by reason of the increase in rates of tax on individuals imposed by the Revenue Act of 1951.

(26 U.S.C. 1952 ed., Sec. 294.)

Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939:

Sec. 39.294-1 " *Additions to the tax.*—

* * * *

(b) *Additions for specific failures on the part of the taxpayer with respect to the estimated tax*—

* * * *

(3) *Substantial understatement of estimated tax.* (1) Section 294(d)(2) provides for an addition to the tax in the case of a taxpayer who makes a substantial underestimate of tax on his declaration. Such addition to the tax shall not apply to the taxable year in which

² The same provision appears in Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939, Section 29.294-1 (b) (3), applicable to the taxable years 1949-1951.

falls the death of the taxpayer. Except as hereinafter provided—

(a) In the case of individuals, other than those exercising the election under section 60(a), relating to farmers, an addition to the tax under section 294(d)(2) is applicable in the event that the amount of the estimated tax (increased by the amount of the credit for taxes withheld at source on wages under section 35 and the credit under section 32) is less than 80 percent of the tax imposed by chapter 1 for the taxable year (determined without regard to such credits). In the event of a failure to file the required declaration, the amount of the estimated tax for the purposes of this provision is zero.

* * * *



United States
COURT OF APPEALS
for the Ninth Circuit

STEVEN VOLOUDAKIS and KATHERINE
VOLOUDAKIS,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVE-
NUE,

Respondent.

APPELLANTS' REPLY BRIEF

*Petition to Review a Decision of the Tax Court
of the United States.*

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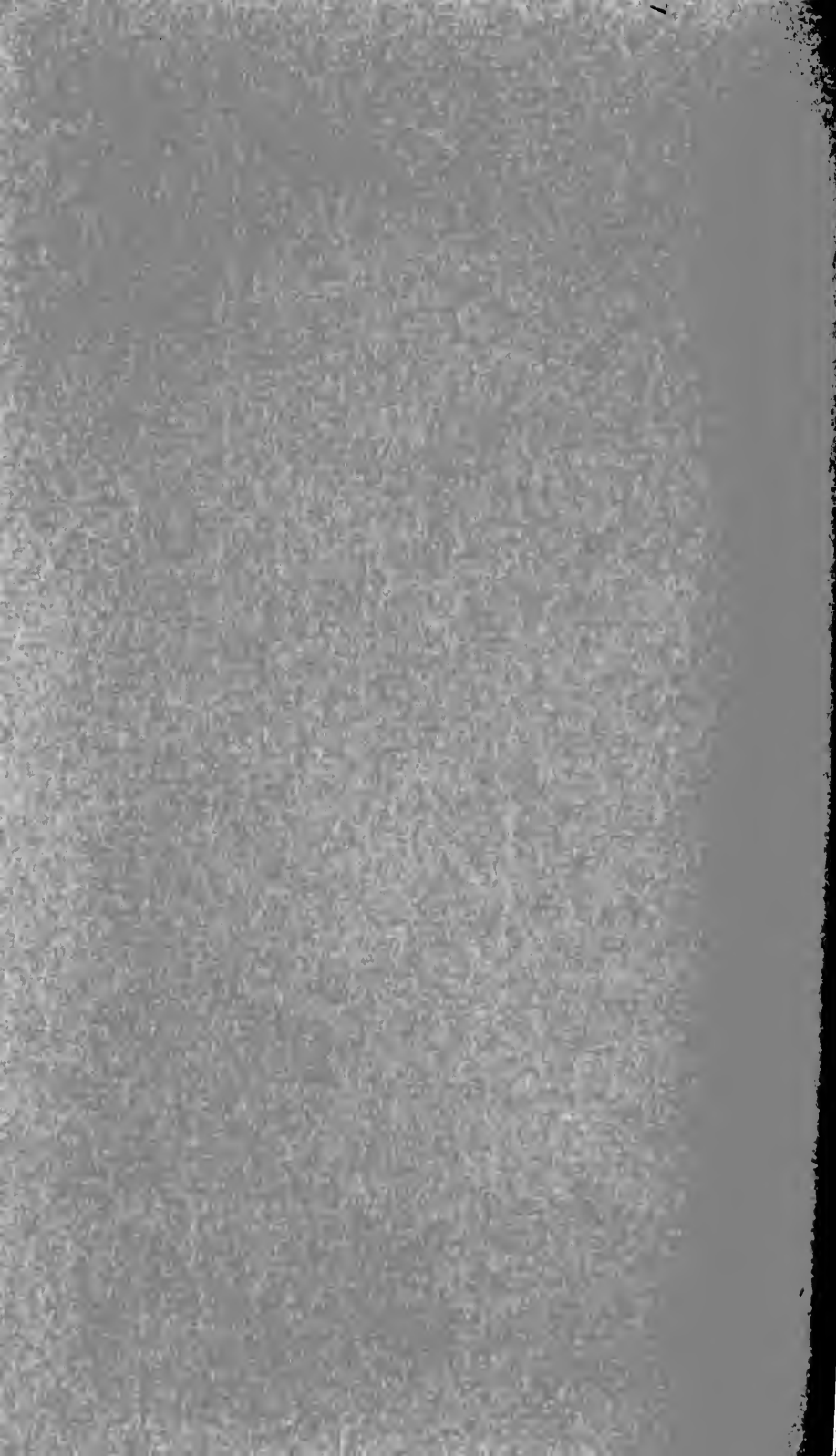
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APPELLANTS' REPLY BRIEF

*Petition to Review a Decision of the Tax Court
of the United States.*

**REPLY TO APPELLEE'S ARGUMENT IN SUPPORT
OF THE JUDGMENT OF THE TAX COURT**

Appellee hinges its argument in support of the Tax Court's decision that the contract executed between Sweeny (the landowner), Pacific (the "lessee") and Appellants (Ex. B-2) was not a sale of a leasehold estate, but was a sublease, upon the following propositions:

1. The terminology of two letters signed by Appel-

lant prior to the execution of the contract (Exs. N and O) indicates that a sublease was intended.

2. The terminology of the contract itself (Ex. B-2) establishes its character as that of a sublease, rather than a contract of sale.

3. The later "agreement" of April 8, 1947, did not supersede and replace the "lease" between Sweeny and Appellants of March 5, 1946, but that both documents continued in full force as subsisting contracts.

4. Pacific did not acquire the entire remaining balance of Appellants' leasehold term as provided under the earlier lease of March, 1946, and therefore the transaction was a subletting and not a sale of the leasehold estate.

5. The provision of the contract (par. 22, Ex. B-2) providing for reentry by Lessees upon condition broken, constitutes in legal effect the retention of a reversionary interest in the leasehold estate, and that such provision establishes the character of the transaction as a subletting.

6. There are no circumstances indicating or suggesting that an outright sale of the leasehold estate to Pacific was intended by the parties.

I.

Language of Preliminary Letters

It is, of course, manifest that the letters (Exs. N and O) in referring to the contemplated transaction, are couched in the terms of a lease, or sublease. However,

it should be remembered that these letters were not prepared by Appellants nor by their attorney, or any attorney. They were prepared by Pacific's real estate agent (R. 59, 60). Furthermore, it does not appear (as stated in Respondent's brief) that these letters were signed "*and sent*" to the agent. A more plausible assumption is that the agent who prepared them, took them to Appellant and secured his signature on them at that time (R. 60). It does not appear that Appellant had any legal advice at this stage of the transaction, or, indeed, at any stage of this transaction.

In any event, these preliminary negotiations must be considered as merged in the final transaction as evidenced by the contract between Appellants, Sweeny and Pacific (Ex. B-2). It is the legal effect of this final document which is controlling in this case.

II.

Language of the Contract

This contract (Ex. B-2) is an "agreement" between the landowner, Sweeny, directly with the "lessee" (NOT "sublessee") Pacific. Appellants were signatories to the contract of necessity. This contract also uses terms indicating that it is a lease, and indeed, it is a lease as between Sweeny, the owner of the property, and Pacific, the "lessee," but it does not even purport to be a lease as between Sweeny and Appellants, or a sublease as between Appellants and Pacific. Merely having Appellants join in the document as signatories did not make

them either lessees or sublessors per se any more than the joining of the lessee in the execution of the deed in *Sutliff v. C.I.R.*, 46 B.T.A. 466, made that lessee a grantor. Lessee joined in the deed as the Tax Court pointed out (R. 33) to "dispose of his leasehold interest." A similar result of eliminating an existing leasehold was accomplished in the instant case by the most usual and practicable method of having Appellants join in the new "agreement" with Pacific.

In none of the decisions cited by Appellee do we find any authority to the effect that the use of terminology in a document controls its legal effect and character. It is quite impossible to reconcile Appellee's argument on this point with the decision of this Court in the case of *Oesterreich v. C.I.R.*, 226 F.2d 798, referred to and quoted in Appellants' opening brief (pp. 22, 24).

In this connection it seems appropriate to point out that the later instrument (Ex. B-2) is not entitled "lease" as was the former one (Ex. A-1) but is called an "agreement." There is not one, single provision in it which obligates Appellants to perform any duty or service to the owner, Sweeny. Their only obligation is to deliver the premises to the new "lessee," Pacific. The usual provisions running from a lessee to a lessor specifically run from Pacific to Sweeny. For example: paragraph 10 gives to only Sweeny the usual lessor's right to inspect. Paragraph 18 reserves to only Sweeny the reversion of improvements on the property. Paragraph 19 authorizes only Sweeny to consent to a holding-over. There is no interest in the property or the leasehold estate retained by Appellants and no reversion is reserved.

III.

Two Mutually Exclusive Leases

Appellee's contention that the original lease of April, 1946 continued in full force and effect and binding upon Appellants after the execution of the later contract (Ex. B-2) is reiterated with minor variations throughout its brief as follows (p. 11):

"No intention is shown anywhere in the record to substitute the sublessee for the taxpayers in the earlier lease so as to effect an assignment."

Or, page 16:

"There is nothing in the record to indicate that the parties to the April 8, 1947 agreement did or intended to eliminate taxpayers and to substitute Sweeny (sic) in their place so as to effect an assignment of the 1946 lease."

Or, page 20:

"In the instant case, the parties did not eliminate the taxpayers and substitute Sweeny (sic) in their place as an assignment, and taxpayers remained liable on their 1946 lease during its term."

There is a fundamental law of elementary physics that two objects cannot occupy the same space at the same time. It is equally true that two people cannot hold the same estate in the same property simultaneously (except, perhaps, under the legal fiction of estates by the entirety, which has no application here).

By the terms of the April 8, 1947 "agreement" Sweeny leased to Pacific the exact property previously leased to Appellants and for the full balance of the

term. This latter "agreement" does not purport, either expressly or by implication, to recognize the leasehold estate of Appellants. It does not purport, either expressly or by implication, to recognize a sublease from Appellants to Pacific. It is a direct lease from Sweeny, the property owner, to Pacific, the "lessee," and the mutual and reciprocal obligations between landlord and lessee are expressly established between Sweeny and Pacific. Even the most fundamental obligation, that of paying rent provided in the 1946 "lease" between Appellants and Sweeny was abrogated and all of the rental payments made thereafter to the landlord were paid by Pacific. The only obligation imposed upon Appellants by this latter "agreement" was that of delivering possession of their leasehold estate to Pacific.

Furthermore, the conduct of the parties throughout the balance of the term recognizes and confirms not only the relationship of landlord and tenant between Sweeny and Pacific, but also the elimination of Appellants from any interest in the property whatsoever. This conduct in and of itself manifests the intention of the parties to "substitute" Pacific as lessee for Appellants. This interpretation of the "agreement" by the parties by their actual performance of the terms of the "agreement" over a period of nine years could hardly be more conclusive.

IV.

Transfer of Entire Term

Appellee makes the surprising argument (Br. pp. 18, 19) that "there is no showing in the record that taxpayers did transfer the entire unexpired term of their original lease." Not only does the contract itself (Ex. B-2) provide in paragraph 2 (b), page 2, for regular payments, but further provides for payment of "the sum of Two thousand, two hundred sixty-six and 67/100ths Dollars (\$2,266.67) per month thereafter during the term of the Voloudakis lease." In addition, there remains the irrefutable fact that Pacific did continue in possession of the property as new lessee under this agreement during the entire balance of the original lease and continued on thereafter under a new lease with Sweeny. There just can be no uncertainty, no question about it: Pacific did, in fact, get the entire balance of the entire unexpired term of the original lease and Appellee's brief (p. 8) so admits.

V.

Re-Entry of Default

It is strongly urged by Appellee that the provision in the "agreement" (paragraph XXII, Ex. B-2), providing that in the event of default by the lessee, "lessors without further notice or demand may enter upon and repossess the premises * * *" is the retention of a reversionary interest in the leasehold estate and therefore

establishes the character of the transaction as a sublease.

No authorities are cited in Appellee's brief (p. 15) on this point and no reference is made to the contrary authorities cited in Appellants' brief, which are to the effect that such a provision does not affect the character of an assignment or reserve a reversionary interest, but merely grants a chose in action in the event of breach. It might be argued with equal effect that a conditional sales contract of an automobile was not a sale but was merely a lease of an automobile, because it contained a provision for repossession of the car in the event of default.

VI.

Circumstances Indicating Intent

Appellee's assertion that there are no circumstances indicating or suggesting that a sale of Appellants' leasehold estate to Pacific was intended, that "there is nothing in form or substance to indicate that the earlier lease was being assigned to Pacific" (Br. p. 15) conveniently ignores the situation of the parties prior to the transaction in question, the legal effect of the "agreement" of April 8, 1947, and the parties course of conduct thereafter.

Attention is invited to the following undisputed facts:

1. Appellants were established in business in the leased property, had purchased additional equipment

and had made substantial changes and improvements in the building in contemplation of their use of the entire building for their business (R. 26, 61).

2. The transaction with Pacific which culminated in the "agreement" of April 8, 1947, was initiated by Pacific's real estate agent, Mr. Churchill Cook, who approached Appellants with the inquiry "So, I walked in and introduced myself to him and asked him whether he would consider selling out and getting out." (R. 58). Mr. Cook further specifically denied on cross-examination that he had asked Appellants whether they wanted "to lease or sublease" (R. 61).

3. There can certainly be no doubt as to Pacific's intentions. According to Mr. Cook's testimony (R. 58, 59) Appellants "had to vacate completely"—"entirely"—"to get out." Pacific took complete possession of the whole property and "did some very extensive remodeling," "spent a large sum of money" for its exclusive use (R. 59).

4. When the transaction with Pacific was closed, Appellants got out and stayed out. They had no further dealings with the property, no further dealings with the property owner, Sweeny, no further dealings with the lessee, Pacific, except to receive periodic payments. It was as clean and complete a severance of interest as could possibly have been accomplished. During the succeeding nine years, no question ever arose between the parties as to their relationship. So far as the property was concerned Appellants were out, completely out, finally out.

It is quite true, as counsel states and reiterates, that Appellant's testimony as to his understanding of the deal was a bit sketchy. This argument, however, is answered by this Court's decision in the *Oesterreich* case (supra), wherein the Court said, as quoted in Appellants' Opening Brief (p. 24):

"However, the test should not be what the parties call the transaction, nor even what they mistakenly believe to be the name of such transaction. What the parties believe the legal effect of such transaction to be should be the criterion. If the parties entered into a transaction which they honestly believed to be a lease, but which in actuality has all the elements of a contract of sale, it is a contract of sale, and not a lease, no matter what they call it, or how they treat it on their books. We must look, therefore, to the intent of the parties in terms of what they intended to happen. (226 F. (2) 798, p. 801)"

Furthermore, Appellants are certainly not responsible and should not be penalized for any failure to develop this phase of the testimony adequately and fully. Certainly this much is clear. So far as Appellant's testimony went, it showed an intention on his part to give up and transfer his entire leasehold estate. Nothing in his testimony, even by the most tenuous implication, suggests he had in mind a sublease.

VII.

Appellee's Authorities

Consideration of the Court decisions cited by Appellee have been reserved to this portion of the brief, where they will be treated and considered together for

the following reason: none of the decisions cited in Appellee's brief are controlling authority in the following basic propositions here involved:

1. That the terminology used by the parties to a transaction either in its preliminary stages or in its final document, determine its character.

2. That the transfer, absolute transfer of an entire leasehold estate by a lessee is nevertheless a sublease.

3. That two leases of the same property, by the same owner, to different parties for the same period of time can both be valid, subsisting leases.

Strict Construction of Statute Re Capital Gain

Burnet v. Harmel, 287 U.S. 103;
Corn Products Co. v. C.I.R., 350 U.S. 46;
C.I.R. v. P. G. Lake, Inc., 356 U.S. 260.

None of these cases cited by Appellee (Br. p. 21) is authority for the asserted proposition that the capital gains provisions of the taxing statute are to be strictly construed, but only that they are not to be stretched to such an extent as to defeat the intended purpose of the law. The *Corn Products* case, citing the *Burnet* case, makes this statement:

"But the capital-asset provisions of § 117 must not be so broadly applied as to defeat rather than further the purpose of Congress. (Citation) Congress intended that profits and losses arising from the every-day operation of a business be considered as ordinary income or loss rather than capital gain or loss. The preferential treatment provided by § 117 applies to transactions in property which are not the normal source of business income."

Clearly the proceeds of the transaction here involved were not "profits arising from the every day operation of the business." It was "a transaction in property which is not the normal source of business income," to these Appellants.

The *Lake* case involved a lump sum payment received as consideration for transfer of oil payment rights and a sulphur payment right. The Court said, referring to Section 117:

"And this exception has always been narrowly construed so as to protect the revenue against artful devices * * *.

"We do not see here any conversion of a capital investment. The lump sum consideration seems essentially a substitute for what would otherwise be received at a future time as ordinary income."

Clearly here there is no artful device whereby Appellants seek to substitute payments from Pacific for what would otherwise be ordinary income at some future time.

Construction Determined by Intent

Appellants certainly have no quarrel with the court decisions cited by Appellee on this phase of its argument (Br. p. 13, et seq.). Two of these decisions were cited and quoted at length in Appellants' opening brief, the other might well have been. They all seem to refute completely the superficial argument of Appellee that the character of the transaction is controlled or determined by the terminology used in the instrument.

In *Hagaard v. C.I.R.*, 241 F2d 288, a case involving

two documents: a lease and an option, the Court made the following statement:

“The intent of the parties was perfectly plain. The bare fact that one of the joined documents was drawn in lease form and terminology by the parties *is of no consequence*. The purpose of the contracts was clear.” (p. 289) (Emphasis supplied)

In *Watson v. C.I.R.*, 62 F2d 35, this Court held that a document written in the terms of a lease was, nevertheless, a conditional sales contract. The Court said:

“It is the legal effect of the whole (document) which is to be sought for. The form of the instrument is of little account.

“If we look to the legal effect of the whole transaction and not to the form, it is obvious that the instrument cannot be accepted as a lease * * *.” (p. 36)

On pages 17 and 18 Appellee discusses the authorities cited in Appellants’ brief to the effect that the transfer of a lease by a lessee or a cancellation or surrender of a leasehold interest is considered a sale for capital gains treatment. Appellee disposes of these authorities out of hand with the statement:

“However, as the Tax Court pointed out (R. 32-36) those cases are clearly distinguishable from the instant case.”

The Tax Court held them inapplicable expressly upon the ground that the contract before it was “couched throughout in language of a lease,” and because of similar language in the preliminary correspondence (R. 34).

Under the *Oesterreich* decision of this Court, and other decisions, this language “is of no consequence.”

Appellee adds the make weight that these cases are also distinguishable because they involve a lump sum payment, but not a single one of these cases indicates that the lump sum test was applied, or was material.

Presumption of Assignment

It is quite true, as Appellee argues, that the presumption of the assignment referred to in Appellants' opening brief (with authorities) is a rebuttable presumption. However, it is rebuttable not by the bare, unsupported argument or statement of counsel, but must be rebutted by affirmative evidence.

In the cited case of *Quine et ux v. Sconce*, 209 Ore. 486, the Court pointed out:

"As a witness defendant admitted that Winter had not assigned the lease to him. * * *"

In the early decision of this Court cited by Appellee, *Northwestern Mutual Life Insurance Co. v. Security Savings & Trust Co.*, 261 F. 575, the Court states the rule as follows (p. 578):

"We agree that as a general proposition, if one other than the lessee is in possession of premises paying rent, the law will presume that the lease of the property has been assigned to such person. On the other hand such a presumption is not irrebuttable; it may be overcome *by proof* that the relationship is a different one." (Citing authorities)

* * *

"Privity of estate by, which one is made liable to perform covenants that run with the land, requires a transfer of the legal title by the lessee and the acceptance of it by the assignee. (Citations)"

In the instant case there was not only privity of estate but privity of contract whereby the "lessee" Pacific expressly and specifically assumed all of the obligations under the lease, including that of paying rent and that of possession.

The case of *Leh v. C.I.R.*, decided Oct. 17, 1958, which counsel quotes, involved transactions "the principal object, result and effect" (of which) "was to terminate rights, not to continue them nor to transfer them, nor sell them nor exchange them;".

And the case of *C.I.R. v. Pittston*, 252 F.2d 344, which involved a payment received for the extinguishment of contractual rights, has no application to this case where a leasehold estate was, in fact, transferred. This distinction is noted in the *Pittston* case, where the court said:

"To be sure, the same might be said of the termination of a lessee's or life tenant's rights, but they have been distinguished as relating to matters of greater 'substance' than mere contract rights." (p. 347)

In the case of *Waller v. C.I.R.*, 40 F.2d 892, the Court affirmed a decision of the Board of Tax Appeals, which decision of the Board was based upon the conclusion that certain instruments affecting the leases which petitioners contended were subleases, constituted assignments or sales, and that consequently petitioners were not entitled to a reasonable allowance for depletion. The Court of Appeals applied the following test (p. 892):

"An assignment of a lease occurs where a lessee

parts with his entire interest in the demised premises or a part thereof for the unexpired term of the original lease. 16 R.C.L. 824, 826; 35 C.J. 988, 989. If the assignor convey less than his entire interest in the whole or a part of his lease, so that there still remains in him a reversionary interest, the transaction amounts to a sublease. * * *

CONCLUSION

It is submitted that except for the inappropriate terminology used in the "agreement" (Ex. 2-B) for which Appellants were not responsible, and the legal connotations of which they did not understand, there could be no question but what the transaction here involved was a sale of a leasehold interest and that the consideration received by Appellants therefrom would be entitled to capital gains treatment. No authority has been presented upon this appeal to contradict the numerous decisions cited to this Court to the effect that such language is "of no consequence" in determining the true nature of the transaction.

Upon the law and the facts this Court should find and hold that the transaction in question was in fact a sale; that the proceeds received by Appellants were entitled to capital gains treatment; that the decision of the Honorable Tax Court was in error and should be reversed and the delinquency assessments vacated and set aside.

McDANNELL BROWN,
Attorney for Appellants.

United States
COURT OF APPEALS
for the Ninth Circuit

STEVEN VOLOUDAKIS and KATHERINE
VOLOUDAKIS,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

*On Petition for Review of the Decision of the
Tax Court of the United States*

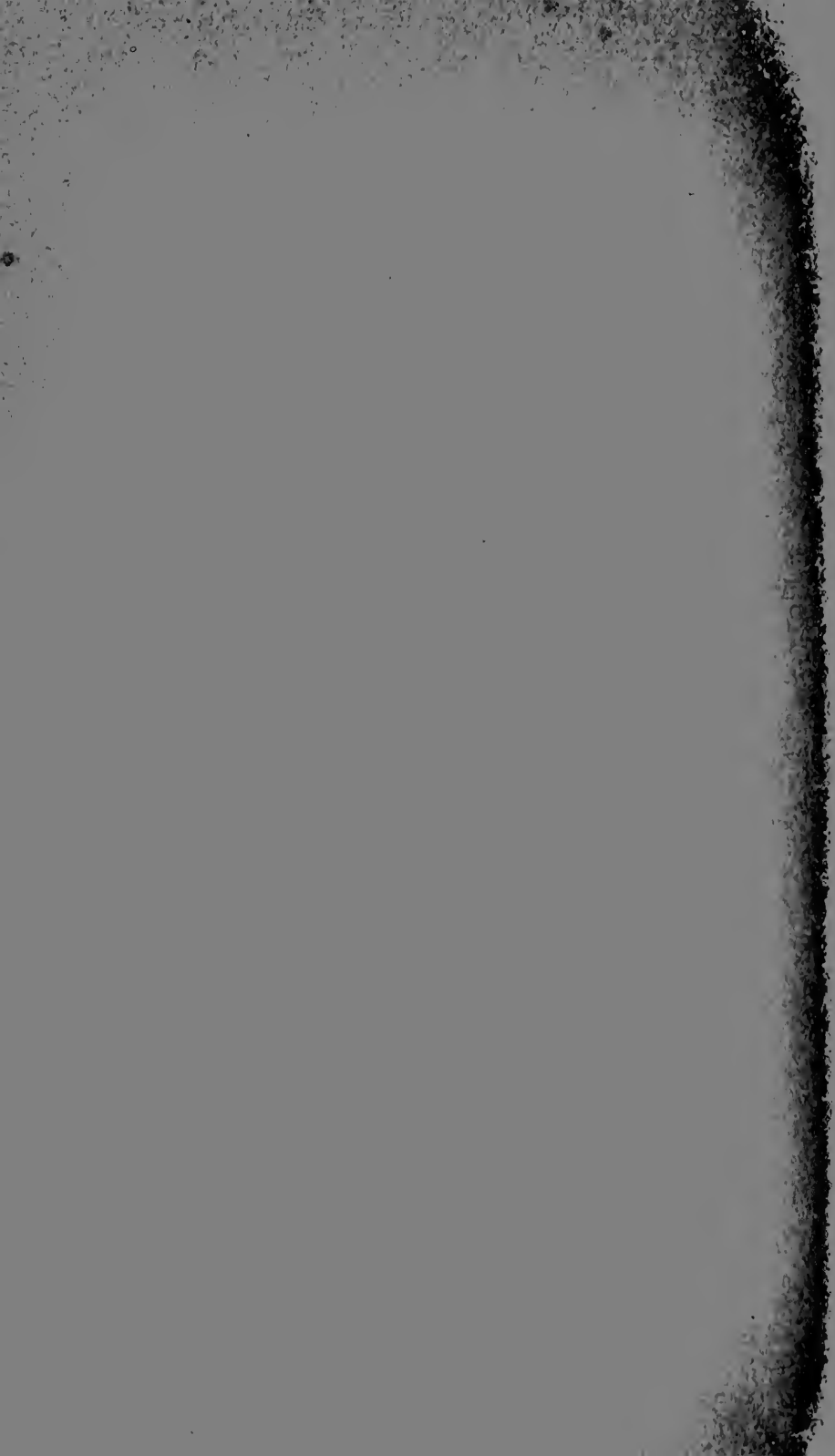
PETITION FOR REHEARING

FILED

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*On Petition for Review of the Decision of the
Tax Court of the United States*

PETITION FOR REHEARING

TO THE HONORABLE WALTER L. POPE and
HONORABLE RICHARD H. CHAMBERS,
JUDGES OF THE ABOVE ENTITLED
COURT:

The above named petitioners, and each of them, respectfully petition this Court for a rehearing in this proceeding and a reconsideration of the Court's decision upon the following grounds:

1. The decision herein is inconsistent with the decision of this Court in the case of *Oesterreich v. Commissioner*, 9 Cir., 226 F.(2d) 798.

2. The decision is based upon a technical and unrealistic interpretation of the instrument in question, without due consideration for any of the surrounding facts, circumstances or conduct of the parties as established by undisputed testimony.

QUESTION FOR DECISION

The question for decision in this case is whether the transaction evidenced by a written document denominated "lease" between a property owner and a prospective "lessee" in which petitioners, the existing lessees, joined to eliminate their leasehold interest and in consideration of which they were to receive certain payments denominated "rental" was as *between petitioners and the new lessee* an assignment of their leasehold interest or a sublease, and consequently whether the consideration received by petitioners constituted capital gain as consistently reported by petitioners from the inception of the agreement or was taxable as ordinary income as contended by the Commissioner.

ARGUMENT

1. *Oesterreich* comparison. The facts and circumstances of record in the instant case would seem to establish a much stronger claim that the document involved actually was an assignment or conveyance of a leasehold estate than the parallel facts and circumstances in the *Oesterreich* case. As to the factors mentioned by the Court, it appears that the documents in both cases were denominated "lease" and that the pay-

ments reserved were called "rent." The decision here turns explicitly upon the point that the so-call "lease" provides that the "lessors" may in the event of default "repossess" the property. Likewise, the *Oesterreich* "lease" provided that in the event of default lessors might terminate the lease.

In *Oesterreich*, the rental payments were not only entered on the lessor's books as "rent" but for years were reported on her tax returns as "rental income." Petitioners here did not record their payments as rental but reported it on their tax returns specifically and explicitly as capital gain on the theory of a sale. In the *Oesterreich* case there were only two parties to the agreement, so there would seem to have been no reason for not executing a contract of sale instead of a "lease" if such were the intent. In the instant case the document was a three-way agreement: a lease between the landlord-owner and the ultimate lessee in possession, Pacific, to which petitioners were made parties merely for the purpose of eliminating whatever interest they might have under their previous lease.

This Court said in *Oesterreich*:

"What the parties believe the legal effect of such transaction to be should be the criterion." (p. 801)

Petitioners herein believed they were parting with their entire estate, making an absolute conveyance of their entire estate. They not only clearly said so on their tax returns but so testified (Tr. pp. 47, 48, 49, 50). This testimony was confirmed by Mr. Cook, representative of Pacific, who negotiated the transaction (Tr. pp. 58, 59).

This Court further said in *Oesterreich*:

“We must look therefore to the intent of the parties in terms of what they intended to happen.” (p. 802)

It is undisputed that the new lessee, Pacific, intended to acquire and retain permanent possession of the premises to the complete exclusion of petitioners for the entire balance of petitioners' original leasehold term. Pacific bought it for specific, permanent use (Tr. p. 59), and agreed to spend \$100,000.00 remodelling it for its specific purposes, which rendered it unsuitable for further use by petitioners (Tr. p. 59). Petitioners “had to vacate completely,” “entirely.” “They had to get out” (Tr. pp. 58, 59).

Further on, this Court said in *Oesterrich*:

“It is enough that the lease provides a right * * * to take title to the premises (leasehold) for which the rental is paid.” (p. 802)

Not only does the “lease” here make such provision, not only does the undisputed evidence disclose such an intent, but that is actually and exactly what happened. The lease period had expired prior to these proceedings and Pacific had, indeed, acquired every shred of interest of petitioners in their leasehold. Thus the expressed intent of the parties was confirmed irrevocably by full performance of the agreement.

If there could be any remaining doubt the testimony of Mr. Churchill Cook, agent of Pacific who negotiated the deal, should dispose of it. He testified (Tr. p. 61) that petitioners did not want to lease or sublease the

property. But when Mr. Cook advised petitioners that he had “a concern that was worth a million dollars or more who would want the space” (Tr. p. 60) a deal was made. It does not appear that petitioners even had legal advice on the contract although petitioner Steven Voloudakis was “not a lawyer” and when asked by the trial judge what his idea of a lease was, testified “I do not know from one end to the other” (Tr. p. 62).

2. This Court in its decision (page 5) quotes the following authority in footnote 3 in support of its position:

“If the fundamental distinction between assignment and sublease is to be recognized, as seems desirable that it should be, the category into which a particular transfer is to be placed *should depend not upon the existence of a technical reversion* in point of time, but upon the intention of the parties to the transfer.” (Emphasis supplied)

18 Cal. Law Rev. 1.

The Court, however, does not apply this rule. Its decision hinges solely and exclusively on a “technical reversion” provision, on the fact that the “lease” contained a provision for repossession of the premises in the event of default. A similar provision in the *Oesterreich* case was not considered significant enough to mention. The Court assumes gratuitously that petitioners “made that choice” of terminology, in spite of the fact that the record discloses clearly that the transaction was negotiated by Pacific through its real estate broker, that the provision in question was a very ordinary and customary provision in a lease and that petitioners “didn’t know from one end to the other” about it. Certainly it

would offer no advantage to the petitioners to recover possession of a piece of property which had been thoroughly remodelled so as to be no longer suitable for their purpose, instead of holding Pacific Telephone and Telegraph Company (the million dollar concern) for the payment of the rent reserved.

The Court apparently completely disregarded not only the testimony of petitioners and Mr. Cook, referred to above, and the position taken by petitioners in filing their tax returns immediately following the transaction, but also certain other provisions in the contract itself which indicate petitioners' intent to relinquish their entire leasehold interest. Page 7 of the contract, paragraph 18, makes no specific provision for surrender of the premises on the termination of the "lease" to petitioners. It does specifically provide that all of the improvements provided for in the lease "shall remain the property of Sweeney (the lessor) on the termination of the lease." And paragraph 19 provides that on the termination of this lease "all obligation to Voloudakis (petitioners) shall terminate." Furthermore, in paragraph 10 the right is reserved to Sweeney only "to enter the premises for the purposes of repair and inspection at any reasonable time."

All of the foregoing facts and circumstances which appear either on the face of the questioned instrument itself or are supported by the undisputed evidence in this case make a very substantially stronger showing of the real intent of the parties that this transaction was, indeed, a sale of a leasehold interest so far as petitioners

were concerned, than does the record in the *Oesterreich* case. Certainly these circumstances in connection with the long recognized and thoroughly adjudicated presumption in favor of assignment,¹ which presumption has been recognized by this Court in the following cases:

Northwestern v. Security Savings and Trust Co.,
261 F. 575 (578)

Madder v. LaCafske, 72 F.(2d) 602 (605)

would seem to be compelling considerations in support of petitioners' contention in this cause. Yet none of these circumstances seem to have received the consideration of the Court in reaching its decision.

CONCLUSION

It is respectfully submitted that a decision in this case under the facts and circumstances as they appear in the record consistent with the doctrine of the *Oesterreich* case should find that the transaction between petitioners and Pacific Telephone and Telegraph Company was in fact and in law a sale of a leasehold interest and as such was entitled to capital gains treatment for tax purposes as consistently reported by petitioners.

¹ Note: Presumption of Assignment

Leadbetter v. Penthereu, 61 Ore. 168 (171).

Montesano v. Portland, 94 Ore. 677 (684).

Quine v. Sconce, 209 Ore. 486 (492).

Yoshida v. Security Ins. Co., 145 Ore. 325 (335).

Respectfully submitted,

MCDANNELL BROWN,
Attorney for Petitioners.



No. 16093 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARY HELEN BURTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 16093

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARY HELEN BURTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Statement of Jurisdiction.

Appellant was indicted with co-defendant Stewart in a two count indictment on October 10, 1957 [C. T. 2]*. A nonjury trial commenced on December 10, 1957 resulting in a conviction of appellant on Count One of the indictment on December 13, 1957 [C. T. 13]. On February 18, 1958, appellant was found in a nonjury trial to have been a second offender within the meaning of 26 U. S. C. Sec. 7237 and was sentenced to be committed to the custody of the Attorney General for a period of ten years [C. T. 19].

A timely notice of appeal was filed on February 25, 1958 [C. T. 24].

The District Court had jurisdiction under the provisions of 21 U.S.C. Sec. 174, 26 U.S.C. Sec. 7237 (c) and 18 U.S.C. Sec. 3231. This Court has jurisdiction of the appeal under the provisions of 28 U.S.C. Sec. 1291.

*C. T. refers to Clerk's Transcript of Record; R. T. refers to Reporter's Transcript of Proceedings before Judge Westover; Yank. refers to Reporter's Transcript of Proceedings before Judge Yankwich.

Statement of the Facts.

On May 2, 1957, two deputy sheriffs employed by the County of Los Angeles and assigned to the Narcotic Detail, conducted an investigation of the appellant. [R. T. 155-160.] At about 10:05 P. M., the officers observed the appellant and one Edwin Stewart, co-defendant of the appellant, arrive in an automobile and park in the driveway of 733 East 55th Street [R. T. 163-164]. The officers observed the defendants enter a garage apartment located on the rear lot and return to the vicinity of their car in approximately 20 minutes [R. T. 167-168]. When the defendants walked down the driveway towards the automobile in which they had arrived, the officers asked them to stop, at which time Stewart made several lunges towards the far corner of the driveway [R. T. 172-173]. Immediately after yelling "Police Officers. Stop.", the officers observed the appellant and noticed that she had her hand underneath her coat and that a small object fell from the coat to the ground [R. T. 175].

The defendant Stewart was seized and appellant was ordered to place her hands on the hood of the automobile [R. T. 175]. Thereafter one of the officers retrieved a small manila envelope from the ground, Exhibit 1-A, which later was identified to contain 88 grains of heroin [R. T. 177; 141-142; 144].

The defendants thereafter were booked in the Los Angeles County jail for violations of both the Federal Narcotics Law and the narcotics laws of the State of California [R. T. 349].

Appellant denied owning, leasing or renting the premises at 733 East 55th Street [Yank. 23-24] and also denied that the object recovered from the ground was hers [Yank. 25, 22].

ARGUMENT.

A. The Instant Heroin Being Abandoned, There Was No Illegal Seizure Thereof.

As pointed out in the Statement of Facts, *supra*, at the time the officers yelled "Police Officers. Stop." appellant dropped Exhibit 1-A, the packet containing 88 grains of heroin, on a driveway of premises in which she had no interest. Appellant's obvious purpose in doing so was to remove from her person the incriminating contraband. It is equally clear that appellant no longer wished to have anything to do with the packet, this being the last item in the world she then wished to possess.

Viewing the transaction from a legal standpoint, appellant desired to and did abandon the packet when she learned police officers were about to take her into custody. This being so, there is no illegal search and seizure by reason of the officer's retrieving the packet from a driveway. The protection of the Fourth Amendment does not extend to abandoned property or to driveways open to public view, but only to "persons, houses, papers and effects."

Hester v. United States, 265 U. S. 57 (1924) is the leading authority on seizure of abandoned articles. There, Revenue Officers observed the transfer of a bottle, attempted apprehension of Hester and one Henderson, and during the pursuit, each defendant threw away a bottle of moonshine whiskey. The Supreme Court held the evidence admissible against claims that it was obtained in violation of the Fourth and Fifth Amendments:

"The officers had no warrant for search or arrest, and it is contended that this made their evidence inadmissible, it being assumed, on the strength of

the pursuing officer's saying that he supposed they were on Hester's land, that such was the fact. It is obvious that even if there had been a trespass, the above testimony was not obtained by an illegal search or seizure. The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle—and *there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned.* This evidence was not obtained by the entry into the house and it is immaterial to discuss that. The suggestion that the defendant was compelled to give evidence against himself does not require an answer. The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land. As to that, it is enough to say that, apart from the justification, the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl. Comm. 223, 225, 226."

In *Cannon v. United States*, 66 F. 2d 13 (8th Cir., 1933), a similar abandonment occurred. Revenue Officers approached appellants' car, commanded them to stop, at which time appellants fled. During the pursuit, they discarded bottles of whiskey they later moved to suppress. The Court held the articles were abandoned and thus admissible in evidence:

"When the defendants started to flee, the officers properly disclosed their identity, gave the proper command to stop, and then rightful pursuit. It is not to be supposed that the defendants threw the liquor out of the car as a delivery of it to the officers,

but in the attempt to destroy it and conceal the liquor and their guilt. Upon these facts there was no violation of the Fourth Amendment. *Hester v. United States*, 265 U. S. 57, 44 S. Ct. 445, 68 L. Ed. 898.”

In *Lee v. United States*, 221 F. 2d 29 (D. C. Cir., 1954), policemen investigating a murder commanded appellant to step out of his car. As he did so, a napkin fell into the street between the car and the curb, which contained stolen jewelry. The Court held the jewelry admissible in the grand larceny trial, stating:

“When asked to get out of the car, the accused was seen to drop into the street, between the car and the curb, a napkin which contained the jewelry later used as evidence. *There was here no seizure in the sense of the law when the officers examined the contents of the napkin after it had been dropped to the street.* *Hester v. United States*, 1924, 265 U. S. 57, 44 S. Ct. 445, 68 L. Ed. 898.” (Emphasis added.)

In *Haerr v. United States*, 240 F. 2d 533 (5th Cir., 1957), after being approached by officers, appellant fled in his car and while fleeing, threw away two boxes containing marihuana. After holding no search occurred, the Court went on to hold that, since the property had been abandoned, also there was no seizure:

“Nor was there a seizure; appellant, by his own design and choice, threw the boxes containing marihuana from the car and *there was no seizure in the legal sense when the patrol returned to recover them.* *Hester v. United States*, supra, and *Lee v. United States*, 1954, 95 U. S. App. D. C. 156, 221 F. 2d 29.” (Emphasis added.)

Applying the rule of the foregoing cases to the instant facts, it appears inescapable that appellant voluntarily abandoned the instant marihuana packet in a drive-way. Thus the evidence was admissible by reason of any one of the following factors:

- (1) According to the cases, there is no "seizure" within the meaning of the Fourth Amendment when voluntarily abandoned property is retrieved;
- (2) The Fourth Amendment does not apply to abandoned property;
- (3) The Fourth Amendment does not apply to seizures made in open fields, or, as here, in open drive-ways.

B. Appellant Had No Standing to Complain of a Search or Seizure.

For the foregoing reasons, appellee believes that no illegal search or seizure was made. However, even if there had been, appellant had no standing to complain thereof.

Appellant specifically denied any interest either in the premises searched or in the goods found on the night of her arrest [Yank. 23-25]. It long has been hornbook law that the guarantee of the Fourth Amendment is a personal privilege which may be asserted only by the one aggrieved, and that a claim of an interest in the searched premises or in the goods seized is necessary for suppression of allegedly illegally obtained goods.

In *Ingram v. United States*, 113 F. 2d 967 (9th. Cir., 1940), this Court stated:

"As noted, Flynn or Woods, the sole lessee of the premises as shown by the evidence, made no complaint or effort to suppress the evidence. The right to complain because of an illegal search and seizure

is a privilege personal to the wronged or injured party, and is not available to anyone else. *Cornelius on Search and Seizure*, Sec. 12, p. 62; *MacDaniel v. United States*, 6 Cir., 294 F. 769. Where the defendant disclaimed ownership of the property seized, he cannot complain of the illegality of the search. *Kwong How v. United States*, 9 Cir., 71 F. 2d 71; *Goldberg v. United States*, 5 Cir., 297 F. 98, 101; *Driskill v. United States*, 9 Cir., 281 F. 146.”

In *Baskerville v. United States*, 227 F. 2d 454 (10th Cir. 1955), it was held:

“The right of protection against unreasonable searches and seizures is personal. To render the seizure unlawful, the defendant must claim some proprietary or possessory interest in that which was seized and sought to be introduced in evidence against him.”

As her only authority supporting her right to complain of the seizure, appellant relies on *Williams v. United States*, 237 F. 2d 789 (D. C. Cir., 1956). There, as here, in a pre-trial motion, appellant had denied ownership of the contraband which he had dropped after he had been taken into custody and while he was in the police station. The Court held that since the unchallenged prosecution evidence at the trial showed appellant had possession of the contraband, he had standing to complain of the illegal seizure.

First, there are distinguishing features to the *Williams* and the instant case.

1. The contraband there was contained on the appellant's person at the time of and after appellant's arrest. The contraband in the instant case was dropped by

appellant *before* she was taken into custody and at the very moment co-defendant Stewart was making a series of lunges to escape arrest. [R. T. 175, 226.] Thus the contraband here was not secured directly “as a result” of any illegal arrest, as was the case in *Williams*.

2. In the *Williams* case, the Court held that the suppression of evidence should have been granted “at the trial” rather than in the pre-trial hearing, since in the pre-trial hearing appellant had disclaimed ownership. The Court carefully pointed out that there was no such disclaimer at the trial and that the only evidence then was that the contraband was that of the appellant:

“The contraband capsules were admitted in evidence. Since they were procured as a result of the illegal arrest the motion for their suppression made *at the trial* should have been granted.

In a pre-trial motion to suppress appellant had disclaimed ownership of the capsules. *But* when his objection to their admission was renewed and acted upon *at the trial itself* the *unchallenged* testimony of the prosecution showed that the capsules were in appellant’s possession until he dropped them, thus giving him standing to object.” (Emphasis added.)

In the instant case, the distinguishing feature is that appellant stipulated that, in ruling on the objection to reception of evidence at the trial, the prior evidence at the motion to suppress could be considered by the Court. (Appellant’s Br. p. 6, lines 1-3.) That prior evidence included appellant’s denial of interest in the contraband. [Yank. 23-24, 25.] Thus, the evidence at the instant trial was *not* “unchallenged” that the instant marihuana was in appellant’s possession.

Second, despite any distinguishing features, appellee is of the opinion that the *Williams* case is contrary to the rule requiring a *claim* of interest either in the premises searched or goods seized, as the case holds that prosecution proof of the defendant's possession is sufficient. In almost every conceivable case, there would be prosecution testimony tending to show that a defendant had constructive or actual possession of the contraband; otherwise, the finding of the contraband would have little relevance or significance as to the defendant. Hence, to say that prosecution proof of possession of illegally seized goods is sufficient to give one standing to object merely is to eliminate the rule requiring a claim of ownership or custody.

The Courts long have laid emphasis on the necessity of the *claim* rather than upon the fact of possession, as can be seen from an examination of the *Ingram* and *Baskerville* cases, *supra*. Even the Court of Appeals for the District of Columbia laid stress upon this aspect in several recent cases. In *Gaskins v. United States*, 218 F. 2d 47 (D. C. Cir., 1955):

"The appellant was merely a guest in the apartment she says was illegally entered, and does not *claim* to have had any interest therein. She *disclaims* ownership of the drugs she contends were illegally seized. She herself was not searched until after she had been arrested with the narcotics openly in her possession. Since the appellant's personal rights were not violated, she has no standing to contend the entry and subsequent seizure were unlawful." (Emphasis added.)

And in *Scroggins v. United States*, 202 F. 2d 211 (D. C. Cir., 1953), it was held:

“Appellant’s standing to challenge must rest upon a *claim* either of possession of the contraband or its seizure from his premises. He denied possession and claimed that if the cigarettes were marihuana, they could not have been seized from his apartment. Thus appellant deprived himself of standing to invoke the rule.” (Emphasis added.)

The necessity of a claim was markedly pointed out by Learned Hand speaking for the Court in *Connolly v. Medalie*, 58 F. 2d 629 (2d Cir., 1932):

“Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part; but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma.”

In *Williams*, the defendant equivocated, winced at admitting he was the owner of the contraband, yet was allowed to secure the remedies of a possessor by the Court of Appeals while avoiding the perils of the part. Since that holding is directly contrary to *Connolly* and other cases on this subject, appellee respectfully requests this Court not to follow the *Williams* decision.

Since appellant denied specifically an interest in the contraband and in the premises near which the contraband was found, appellant had no standing to complain of any illegal search and seizure, if such were made.

C. The Contraband Was Given to Federal Agents on a Silver Platter.

Should this Court find that (1) there was an illegal search and seizure and (2) that appellant has standing to complain thereof, appellee contends the instant evidence was handed the Government Agents "on a silver platter" within the meaning of the rule laid down by this Court in *Rios v. United States*, 256 F. 2d 173 and *Anderson v. United States*, 237 F. 2d 118.

There would seem to be no question but that the evidence shows that Government agents did not participate in the search nor know about this case until after the arrest. [Yank. 48; R. T. 58, 90-91, 93, 111-112.] Admittedly, these officers have cooperated with one another over a period of four to five years. Appellee would distinguish this particular case from that pattern of cooperation by the testimony of federal agent Richards at [R. T. 114-115]:

"Q. Isn't it a fact that all the cases, Mr. Richards, involving narcotics, the arrests in all the instances arising therefrom, which Officers Landry, Farrington, and Gillette work on, are always joined with you? A. Not all cases. I mean the cases where an officer makes purchases from various people using government official advanced funds, they are the ones which are prosecuted in federal court and which we work jointly together.

Q. No other type of cases? A. What do you mean?

Q. No other type of cases than those just mentioned by you? A. That's all I know."

Thus, the pattern of cooperation built up by the Los Angeles County Sheriff's office and the Federal Bureau of Narcotics is with respect to cases worked jointly by them, that is, when purchases are made by an agent or a deputy from a prospective defendant and other agents or officers observe the transaction. No pattern of cooperation has been established whereby arrests are made by deputies without probable cause and the fruits thereof are turned over to federal agents.

Appellee would be less than candid with the Court, however, if it did not admit that it would prefer to see this Court decide the instant case on either the ground that the instant heroin was abandoned, or that appellant has no standing to complain of its seizure, or both. In view of the granting of certiorari in the aforesaid *Rios* case by the Supreme Court, it well may be that the long-settled rule of "silver platter" may be cast aside by that Court.

Moreover, appellee believes its arguments of abandonment and lack of status to complain have firmer basis in the record than its argument concerning the lack of cooperation between the agencies.

D. The Failure to Plead the Prior Offense in the Original Information Is Not in Violation of the Constitution.

The constitutionality of the Boggs Act (Sec 21 U.S.C. Sec. 174 and 26 U.S.C. Sec. 7237) and its procedures would seem to have been settled in this Circuit by *Sherman v. United States*, 241 F. 2d 329 (9th Cir., 1957).

E. The Trial Court Had the Duty to Impose a Ten Year Sentence.

Nothing would seem to be more clear than the language of 21 U.S.C. Sec. 174 that:

“For a second or subsequent offense (as determined under Section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years. . . .”

The fact that appellant insisted upon and won the right to waive a jury trial [See R. T. 492-512] on the issue of her being a second offender under 26 U.S.C. Sec. 7237 (c) would not seem to alter the mandatory sentence provisions of 21 U.S.C. Sec. 174.

Moreover, the propriety of appellant's having waived her right to a jury trial is unquestioned in this appeal.

See:

Federal Rules of Criminal Procedure, Rule 23 (a);
Padilla v. United States, F. 2d(No.
16, 162, 9th Cir., decided May 6, 1959).

Conclusion.

Appellant, previously convicted in federal court in 1954 of a sale of narcotics, and previously convicted of the felony of forgery, was found to be in possession of narcotics again in May, 1957. The law, in its wisdom, precludes the use of evidence obtained by arrests made without what the law describes as probable cause.

However, the law grants the privilege of suppressing such evidence only to those bold enough to acknowledge their interest therein. In addition, the law renders ad-

missible in any event evidence discarded and abandoned by defendants.

Appellant dropped the instant heroin like the proverbial hot potato, thus abandoning it. Moreover, she specifically denied any interest therein, thus foreclosing her from asserting the technical defense of illegal search and seizure. Consequently, no error was committed in receiving the instant heroin in evidence and in convicting appellant.

This being appellant's second federal conviction involving narcotics, she very properly received the mandatory sentence of ten years prescribed by Congress. Appellee therefore respectfully submits that the judgment appealed from should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,

United States Attorney,

ROBERT JOHN JENSEN,

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Assistant Chief, Criminal Division,
Attorneys for Appellee.*

No. 16097 ✓

United States
Court of Appeals
for the Ninth Circuit

ROBERT E. AUSTIN and MARIAN H.
AUSTIN, Petitioners,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax
Court of the United States

FILED

OCT -1 1958

PAUL P. O'BRIEN, CLERK



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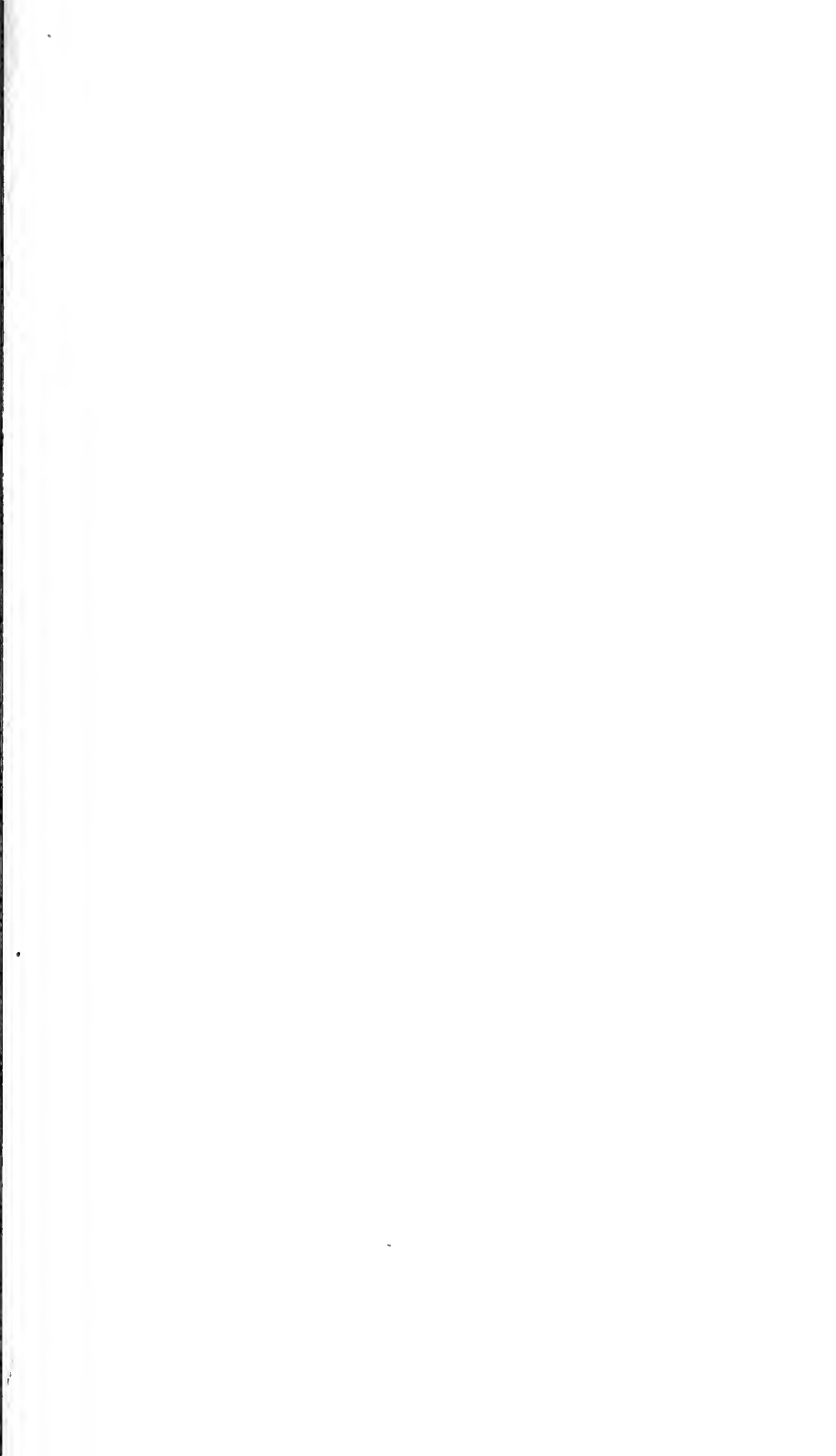
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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The Tax Court of the United States

Docket No. 57111

ROBERT E. AUSTIN and MARIAN H.
AUSTIN, Petitioners,
vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.
PETITION

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency Ap:LA:AA:KD-HT 90D:VFC dated December 31, 1954, and as a basis of their proceeding allege as follows:

1. The petitioners are individuals, husband and wife, with residence at 500 Poinsettia Avenue, Manhattan Beach, California. The returns for the period here involved were filed with the Collector for the Los Angeles District of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioners on December 31, 1954.

3. The deficiencies as determined by the Commissioner are in income taxes for the calendar years 1950, 1951 and 1952, in the amount of \$2,503.30, all of which is in dispute.

4. The determination of tax set forth in the said

notice of deficiency is based upon the following errors:

(a) Profits arising from sale of real estate owned and held by petitioners as investments were classified as regular income whereas they should have been classified as long term capital gains.

(b) Determined that one of us (which one is not indicated) is subject to self-employment tax as provided by Section 481 of the 1939 Internal Revenue Code for the years 1951 and 1952.

5. The facts upon which the petitioners rely as the basis of this proceeding are as follows: Petitioners at various times acquired the real estate, sales of which are involved in this matter, as investments and held said real estate as investments with the hope that values and prices would rise. The property sold was held by petitioners for from two to seven years. All sales were made to persons who sought out petitioners and made unsolicited offers to purchase without any sales activity on the part of petitioners. None of said property was held for sale to customers, nor for sale in the course of taxpayers' trade or business. Neither of the petitioners is or ever was engaged in buying and selling real estate as a trade or business, and none of said real estate was sold in the regular course of petitioners' trade or business. The business or occupation of petitioner Robert E. Austin is and at all times involved herein was that of attorney at law, and he was during the years involved herein at no time engaged in any other business. That petitioner

Marian H. Austin at all times concerned herein is and was a housewife, and was not in anywise engaged in the business of buying and selling real estate, or any other business except that of being a housewife.

Wherefore, the petitioners pray that this Court may hear the proceeding and determine that the Commissioner's findings, as set out in his notice, a copy of which is attached hereto and marked Exhibit A, are incorrect, and that no deficiencies whatsoever are due from petitioners in the matters covered by said letter.

/s/ ROBERT E. AUSTIN,

/s/ MARIAN H. AUSTIN.

Duly Verified.

EXHIBIT "A"

Form 1230 (App.)

U. S. Treasury Department
Internal Revenue Service
Regional Commissioner
1250 Subway Terminal Building
417 South Hill Street
Los Angeles 13, California

Dec. 31, 1954

In replying refer to
Ap:LA:AA:KD-HT
90D:VFC

Mr. Robert E. Austin and
Mrs. Marian H. Austin
Husband and Wife
500 Poinsettia Avenue
Manhattan Beach, California

Dear Mr. and Mrs. Austin:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1950, December 31, 1951, and December 31, 1952, discloses a deficiency or deficiencies of \$2,502.30, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not ex-

Exhibit "A"—(Continued)

clude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, 1250 Subway Terminal Building, Los Angeles 13, Calif. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earlier.

Very truly yours,

T. COLEMAN ANDREWS,

Commissioner,

By H. L. DUCKER,

Acting Associate Chief, Appellate.

Enclosures: Statement, Form 1276, Agreement Form.

Ap:LA:AA:KD-HT
90D:VFC

STATEMENT

Mr. Robert E. Austin and Mrs. Marian H. Austin, Husband and Wife, 500 Poinsettia Avenue, Manhattan Beach, California.

Exhibit "A"—(Continued)

Tax Liabilities for the Taxable Years Ended

December 31, 1950

December 31, 1951

December 31, 1952

Income Tax

	Deficiency
1950	\$ 395.96
1951	429.46
1952	1,676.88
Total	<u>\$2,502.30</u>

In making this determination of your income tax liabilities, careful consideration has been given to the report of examination, a copy of which was forwarded to you on September 10, 1954, to your protest dated October 5, 1954, and to the statements made at a conference held on November 10, 1954.

It has been determined that you realized ordinary income of \$7,782.56 in 1950, \$10,476.79 in 1951, and \$9,308.59 in 1952, from the sales of unimproved real estate instead of long-term capital gains as reported in your returns. Accordingly, the net income reported has been increased by those amounts and decreased by the amounts of the taxable portion of the long-term capital net gains reported thereon for the respective taxable years.

It has been determined that you are subject to self-employment tax as provided by section 481 of the 1939 Internal Revenue Code for the years 1951 and 1952.

Taxable Year Ended December 31, 1950

Adjustments to Net Income

Net income as disclosed by return	\$1,499.30	
Additional income:		
(a) Ordinary income	\$7,782.56	
Reduction in income:		
(b) Capital gain	4,006.24	3,776.32
Net income adjusted		<u>\$5,275.62</u>

Exhibit "A"—(Continued)

Explanation of Adjustments

- (a) This adjustment has been previously explained herein.
 (b) The adjustment to gain from sale of capital assets is shown below:

Net capital gain reported which is included in profit from real estate sales reflected in item (a) above		\$3,006.24
Capital loss carry-over from 1949	\$4,347.85	
Less: Capital loss limitation for the taxable year	1,000.00	1,000.00
Capital loss carry-over to 1951	\$3,347.85	
Adjustment		\$4,006.24

Computation of Tax

Net income adjusted	\$5,275.62
Less: Exemptions (5)	3,000.00
Amount subject to tax	\$2,275.62
Joint return (one-half)	\$1,137.81
Tentative tax	227.56
Less: 13%	29.58
Total tax	\$ 197.98
Joint return (multiplied by 2)	\$ 395.96
Correct income tax liability	\$ 395.96
Income tax liability as disclosed by return, Acct. No. 3213191	None
Deficiency of income tax	\$ 395.96

Taxable Year Ended December 31, 1951

Adjustments to Net Income

Net income as disclosed by return	\$13,073.41
Additional income:	
(a) Ordinary income	\$10,312.16
Reduction in income:	
(b) Capital gain	\$8,021.57
(c) Taxes	1,000.00 9,021.57 1,290.59
Net income adjusted	\$14,364.00

Exhibit "A"—(Continued)

Explanation of Adjustments

(a) This adjustment has been previously explained herein.

(b) The adjustment to gain from sale of capital assets is shown below:

Net capital gain reported \$ 9,499.36

Net capital gain adjusted from sale of

laundry:

Selling price \$9,000.00

Cost \$13,806.82

Less depreciation:

Per return\$9,057.92

Additional

1951 164.63 9,222.55

Adjusted basis 4,584.27

\$4,415.73

Less expense of sale 936.50

Recognized gain \$3,479.23

Long-term capital gain (50 percent) \$1,739.62

Add: Joint venture long-term

capital gain 3,086.02

Total long-term capital gain \$4,825.64

Less: Capital loss carry-over

from 1950 3,347.85

Corrected net capital gain 1,477.79

Adjustment \$ 8,021.57

(c) Your deduction for taxes paid on real and personal property in Los Angeles County has been increased in the amount of \$1,000.00 in accordance with your amended return.

Exhibit "A"—(Continued)

Computation of Tax

Net income adjusted	\$14,364.00
Less: Exemptions (5)	3,000.00
<hr/>	
Amount subject to tax	\$11,364.00
Joint return (one-half)	\$ 5,682.00
Income tax on \$5,682.00	\$ 1,310.14
Joint return (multiplied by 2)	\$ 2,620.28
Add: Self-employment Tax (2¼% of \$3,600.00)	81.00
<hr/>	
Correct income tax liability	\$ 2,701.28
Income tax liability as disclosed by return, Acct. No. 261029106	2,271.82
<hr/>	
Deficiency of income tax	\$ 429.46

Taxable Year Ended December 31, 1952

Adjustments to Net Income

Net income as disclosed by return	\$ 8,625.49
Additional income:	
(a) Ordinary income	\$9,308.59
(b) Taxes	426.72 \$9,735.31
<hr/>	
Reduction in income:	
(c) Capital gain	3,872.00 5,863.31
<hr/>	
Net income adjusted	\$14,488.80

Explanation of Adjustments

- (a) This adjustment has been previously explained herein.
- (b) Sales Taxes on the purchase of materials for construction of business property have been disallowed in the amount of \$426.72 for the reason that such taxes should be capitalized.
- (c) The adjustment to gain from sale of capital assets is shown below:

Long-term capital gains reported	\$ 5,101.25
Long-term capital gains corrected from sale of 4 acres on Rowell, Home Place \$693.25	
From joint venture	445.00 1,138.25
<hr/>	
Adjustment	\$ 3,872.00

Exhibit "A"—(Continued)

Computation of Tax	
Net income adjusted	\$14,488.80
Less: Exemptions (5)	3,000.00
<hr/>	
Amount subject to tax	\$11,488.80
Joint return (one-half)	\$ 5,744.40
Income tax on \$5,744.40	\$ 1,441.88
Joint return (multiplied by 2)	\$ 2,883.76
Add: Self-employment tax (2 $\frac{1}{4}$ % of \$3,600.00)	81.00
<hr/>	
Correct income tax liability	\$ 2,964.76
Income tax liability as disclosed by return, Acct. No. 263011925	1,287.88
<hr/>	
Deficiency of income tax	\$ 1,676.88

Served March 29, 1955.

[Endorsed]: T.C.U.S. Filed March 25, 1955.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, R. P. Hertzog, Acting Chief Counsel, Internal Revenue Service, for answer to the petition of the above-named taxpayers, admits, denies and alleges as follows:

1. Admits that the returns for the period here involved were filed with the Director, or then Collector, of Internal Revenue for the Sixth Collection District of California, at Los Angeles; and admits the remaining allegations of paragraph 1 of the petition.

2. Admits the allegations in paragraphs 2 and 3 of the petition.

4. Denies the allegations of error contained in paragraph 4 of the petition and all subparagraphs thereof.

5. Denies the allegation contained in paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition not heretofore expressly admitted, qualified or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ R. P. HERTZOG, REM,
Acting Chief Counsel, Internal
Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel,
E. C. Crouter, Assistant Regional Counsel,
R. E. Maiden Jr., Special Assistant to Regional
Counsel, Godfrey L. Munter Jr., Attorney, Internal
Revenue Service.

[Endorsed]: T.C.U.S. Filed May 3, 1955.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is stipulated that the following facts may be received in evidence without further proof; provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts stipulated; and provided, further,

that both parties to this stipulation reserve the right to object to the materiality and relevancy of any of the facts herein stipulated.

1. The petitioners are individuals; are husband and wife, and reside at 500 Poinsettia Avenue, Manhattan Beach, California. The income tax returns for the period here involved, 1950, 1951 and 1952, were filed with the Collector, now Director, for the Los Angeles District of California. Photostatic copies of the returns are attached as joint exhibits 1-A, 2-B, 3-C and 4-D.

2. Petitioner, Robert E. Austin is a lawyer engaged in the private practice of law, and has been so engaged for the past forty years, having his law office in down town Los Angeles.

3. Petitioner, Marian H. Austin, at all times mentioned in this proceeding has been a housewife.

4. All lots and sales involved were in the Manhattan Beach area, except one.

5. The real estate purchases and sales by petitioner for the years 1943 to 1952, inclusive, are as follows:

Year	Purchases		Sales	
	Number of Transactions	Number of Lots	Number of Transactions	Number of Lots
1943	2	2	0	0
1944	2	5	0	0
1945	3	69½	0	0
1946	6	64½	24	38
1947	6	16	8	13
1948	3	9	22	26
1949	1	1	7	15
1950	1	1	5	11
1951	—	—	8	23
1952	—	—	10	14

7. The taxpayers for many years have been residents of the City of Manhattan Beach. Mr. Austin has been active in local affairs there for many years. He served as School Trustee, helped organize the local water district, participating in many elections relating thereto, and has been a member of the Board of Directors of the water district, and is presently the representative of that district on the Board of the Metropolitan Water District of Southern California.

8. The telephone at home is and always has been listed in Mrs. Austin's name. It is "Austin, Marian H., 500 Poinsettia Ave., Manhattan Beach." Mr. Austin's name has never been listed in the Manhattan Beach telephone directory.

9. Manhattan Beach is approximately 19 miles from downtown Los Angeles.

10. If it is determined that either or both are in the real estate business then the Commissioner has properly determined the self-employment tax as shown in the statutory notice of deficiency.

/s/ ROBERT E. AUSTIN,

Petitioner,

/s/ MARIAN H. AUSTIN,

Petitioner.

/s/ NELSON P. ROSE, REM,

Chief Counsel, Internal Revenue Service, Counsel
for Respondent.

[Endorsed]: T.C.U.S. Filed April 22, 1957.

Tax Court of the United States

Robert E. Austin and Marian H. Austin, Petitioners, vs. Commissioner of Internal Revenue, Respondent.

Docket No. 57111. Filed April 24, 1958.

Wendell H. Davis, Esq., and Robert E. Austin, Esq., pro se, for petitioners.

Gene F. Reardon, Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT AND
OPINION

Respondent determined deficiencies in petitioners' income tax for the years 1950, 1951 and 1952 in the respective amounts of \$395.96, \$429.46 and \$1,676.88.

At issue is whether lots which were the subject of certain sales were held by petitioners primarily for sale to customers in the ordinary course of their trade or business.

Findings of Fact

Some of the facts have been stipulated and are so found.

Robert E. Austin (hereinafter sometimes referred to as "Robert" or "petitioner") and Marian H. Austin are husband and wife. They filed joint returns for the years at issue with the then collector of internal revenue at Los Angeles, California. Since 1948 they have resided at 500 Poinsettia Avenue, Manhattan Beach, California. Marian H. Aus-

tin is a housewife and had little connection with the transactions set forth below. All lots and sales involved were in the Manhattan Beach area, except one.

Robert has practiced law since 1912, and at all times here relevant had his law office in downtown Los Angeles approximately 19 miles from Manhattan Beach. He first became the owner of real property in Manhattan Beach in 1918. This property was transferred to him in payment for legal services. Manhattan Beach was then primarily a resort area, and throughout the period 1918-1929 Robert owned either a cabin or a home there. In 1929 he established his residence in Manhattan Beach, and he has resided there continuously since that year. The population of Manhattan Beach in 1929 was approximately 5,000.

Since 1932 Robert has been active in the civic affairs of his community. He has been a member of the School Board. He helped to organize the local water district and has been a member of its Board of Directors. He represents his water district on the Board of Metropolitan Water District of Southern California.

The parties have stipulated the following real estate acquisitions by petitioners during the period 1943-1952:¹

¹ Some lots, in addition to the foregoing, were also acquired by petitioners during this period.

Year	No. of Transactions	No. of Lots
1943	2	2
1944	2	5
1945	3	69½
1946	6	64½
1947	6	16
1948	3	9
1949	1	1
1950	1	1
1951	0	—
1952	0	—

The lots acquired by petitioners in 1943 were purchased at an auction of tax delinquent properties. Robert and others, prior to the auction, asked the local tax collector to include certain lots among those scheduled for sale, and agreed to make opening bids on these lots. Robert bid on 30 or 40 lots at this auction. Robert purchased one lot for a friend who at the time of the bidding had used up his available funds.

Three of the lots acquired in 1944 were received in payment for Robert's legal services. Taxes were never paid by petitioners on this property and the lots were subsequently sold to meet the tax bill. Two other lots acquired in that year were located across the street from where petitioners were then residing, and were purchased to protect the character of the neighborhood.

One hundred and two of the lots acquired during 1945 and 1946 were sold to petitioners by the city of Manhattan Beach. The sales arose from the following circumstances: Certain property, located in Manhattan Beach (sometimes hereinafter refer-

red to as the city), was owned by the State of California and was not on the city's tax rolls. In order to list the property on the city's tax rolls it had to be privately owned, and the officials of the city were desirous of bringing about this result. Accordingly, a plan was devised whereby the city could acquire the property and then sell it to private parties. This plan entailed expenditures in amounts greater than the officials of the city were prepared to undertake. To aid in carrying out the plan Robert and three others agreed to pay the city any loss it might suffer as a result of this plan. In accordance with this agreement Robert purchased 102 lots which the city had acquired from the State and which it was unable to dispose of at public auction.

Petitioners acquired two lots in 1945 from a Mr. Friedman, one of Robert's clients.

Petitioners purchased nine lots from the Pacific Land and Title Company in 1945. These purchases were connected with Robert's membership in the Manhattan Beach Property Owners Association and that association's interest in acquiring a park.

Two of the lots acquired by petitioners in 1946 were located across the street from where they then resided, and were purchased to protect the character of the neighborhood.

Petitioners acquired 21 lots in 1946 from the Amaranth Land Company. These acquisitions came about in the following manner: A client of Robert's was involved in a joint venture concerning

real property. At the death of the client Robert was retained by the deceased's family to represent them in the disposition of the joint venture's property. In the course of winding up the joint venture, and while acting on behalf of the family, Robert entered the highest bid for the property. The family was interested in improving its cash position, and was disappointed in Robert's actions on their behalf. Robert paid the amount bid to the joint venture and the property was sold to him.

Petitioners purchased one lot in 1946 and four lots in 1947 which adjoined property already owned by them. The new acquisitions were to provide automobile parking facilities should future improvements on the original lots make such facilities necessary or appropriate.

Petitioners acquired two tracts of land, referred to as "lots" by the parties, in 1947 which totaled 125 acres. Part of this acquisition was received by Robert in payment for legal services.

Petitioners purchased six lots in 1947 for possible use as a site for a house. They built a house on these lots toward the end of 1948, and since that time it has been their home. Two other lots acquired by petitioners in 1947 were transferred to them by a couple who had earlier been given the property by petitioners with the understanding that they (the couple) pay for it whenever able. The uncertain financial position of the couple in 1947 resulted in the retransfer of the property.

Two lots purchased by petitioners in 1947 from a real estate broker were subsequently improved, and supply them with rental income.

Two additional lots were acquired in 1947 under the following circumstances: On one occasion in 1947 a client, Mr. Clendennin, came to Robert's office and discussed with him problems concerning certain lots owned by the client's daughter. Clendennin thought that his daughter would eventually lose money on these lots. He returned about one week later, told Robert that he had been advised that he (the client) did not have long to live, and asked Robert to purchase the daughter's property. Robert purchased two lots from the daughter; shortly thereafter the client died.

Four lots acquired in 1948 were purchased for residential purposes, and petitioners lived in the house thereon during 1948. They sold this property after moving into the house built on the six lots mentioned above.

Petitioners purchased three lots in 1948 from the Pacific Land and Title Company.

One lot was purchased in 1949 to make available additional parking and sewage facilities to a building, owned by petitioners, which housed a laundry.

Petitioners purchased one lot in 1950 from a neighbor who was unable to pay a debt to Robert. They paid for the lot, in part, by cancelling the indebtedness.

Petitioners made the following sales of real property:

Year	No. of Transactions	No. of Lots
1943	0	—
1944	0	—
1945	0	—
1946	24	38
1947	8	13
1948	22	26
1949	7	15
1950	5	11
1951	8	23
1952	10	14
1953	4	? ²
1954	1	?
1955	5	?

Payment for the sales was sometimes made in installments.

Petitioners acquired the lots sold in 1950, 1951 and 1952 in the following years:

Year	Lot Acquired	Year Lot Sold		
		1950	1951	1952
1943		1		
1944				2
1945		4	1	4
1946		6	20	6
1947				1
1948			2	
1949				1

Petitioner made sales of real property in the following total amounts:

1950	\$ 7,750.00
1951	15,750.00
1952	21,584.32

² Question marks are used herein to indicate the absence of relevant evidence in the record.

Petitioners' gross income for the years 1943 through 1952 was composed of the following items:

Year	Rent	Number of		Gross Amount		Net		Net Profit on Real Estate Sales	Gross Income
		Income from Interest	Law Practice Fee Collections	Law Practice Fee Collections	Law Practice Collections	From Law Practice	Practice		
1943	1,890.00	195.00	101	3,849.10	1,832.93				5,934.10
1944	1,140.00	—	106	6,628.23	4,434.48		678.00		8,446.23
1945	—	—	122	9,081.18	5,444.90		210.32		9,291.50
1946	—	—	89	5,345.00	1,756.62		17,655.71		23,000.71
1947	7,596.00	390.00	77	7,649.15	3,502.89		12,357.70		27,992.85
1948	10,762.79	288.40	76	5,977.10	2,166.40		6,737.12		23,765.71
1949	5,838.50	696.38	83	6,079.19	1,476.43		6,029.72		18,613.79
1950	5,156.00	522.51	91	5,232.67	1,162.91		7,782.56		37,637.53
1951	6,820.94	897.72	140	9,369.80	4,851.60		10,476.79		27,556.25
1952	7,125.00	2,141.07	117	6,156.68	1,279.08		9,308.59		24,734.34

The net profit on real estate sales shown above for the years 1950 through 1952 includes the profit

from installment payments received in those years on account of 12 sales made in prior years.

Petitioners' income from Robert's law practice and their real estate sales for 1953, 1954 and 1955 follows:

Year	Net Profit on Real Estate Sales	Gross Amount Law Practice Fee Collections	Net Amount Law Practice Fee Collections
1953	\$ 9,256.24	?	?
1954	16,675.56	\$7,567.00	\$2,825.00
1955	19,822.00	9,900.00	4,544.00

The net profit on real estate sales shown above for the years 1953 through 1955 includes installment payments received in those years on account of sales made in prior years.

Petitioners did not advertise in connection with their real property, nor did they post any "for sale" signs. They did not list their property with real estate brokers, and neither of them was a licensed real estate broker. They did not maintain an office in their home, and their home telephone number was listed under the name of Marian H. Austin.

Sales were initiated by prospective customers contacting petitioners through the mails or over the telephone. Negotiations were conducted in the same manner, and petitioners often did not come into personal contact with purchasers. On some occasions sales were initiated by brokers. On these occasions the brokers were acting for third parties.

Whenever necessary Robert would prepare legal documents in connection with a sale in his law

office. Prospective customers never came to his law office. Most of the sales involved were closed in escrow offices, not at petitioners' home.

Petitioners sometimes borrowed money from banks to help finance real property purchases.

There has been a large amount of real estate development in Manhattan Beach since 1945. People interested in purchasing property in Manhattan Beach went through the tax rolls to learn the names of property owners. Owners of property received numerous unsolicited inquiries concerning their property. Petitioners were aware of this situation.

The real property owned by petitioners was listed on the tax rolls under the names of Robert E. Austin and Marian H. Austin at their home address.

The lots sold by petitioners were held by them primarily for sale to customers in the ordinary course of trade or business.

Opinion

Raum, Judge: Was the real property sold by petitioners during the years in question held by them primarily for sale to customers in the ordinary course of their trade or business? That is the sole question herein. It is essentially one of fact. And, after re-examining the whole record, we have concluded that it should be answered in the affirmative.

In this connection the Court of Appeals for the Ninth Circuit in *Rollingwood Corp. v. Commissioner*, 190 F. 2d 263, said, at p. 266:

Most of the cases dealing with the problem

of whether property is held primarily for sale to customers in the ordinary course of trade or business involve situations where the taxpayer is engaged in some activity apart from his usual occupation and the question is whether this activity amounts to a business. The test normally applied in these situations is the frequency and continuity of the transactions claimed to result in a trade or business.

Applying these principles to the facts of the present case, there appears to be a more or less consistent activity in the sale of lots over a period of years, resulting in a steady flow of income. Taking into account the number of purchases, sales, the frequency and continuity of the transactions over the period involved, as well as other facts of record, we have concluded that the profits in question represented more than the fruits of the liquidation of casual investments but were such as to have had their source in the conduct of a real estate business.

Petitioners made a total of 94 sales during the period 1946 through 1955, 23 of which were made in the years 1950 through 1952. Over the longer period not less than 150 lots were sold, and a total of 48 were sold in the three years in issue. We are satisfied that petitioners were not engaged in isolated or casual selling transactions.

Petitioners' occupation with real estate matters is better appreciated when it is remembered that during the period 1943 through the years in question they acquired not less than 168 lots in 24 trans-

actions, and that two of these so-called lots totalled 125 acres. Additionally, petitioners' net profits from real estate sales were substantially in excess of the net collections from Robert's law practice in the three years before us and in most of the other years for which we have evidence. See *Mauldin v. Commissioner*, 195 F. 2d 714, 717 (C.A. 10), and *Estate of Luke J. Barrios*, 29 T.C.,— at p.—.

Robert testified that real estate transactions took up little of his time. But, as was pointed out in *Estate of Luke J. Barrios*, *supra*, at p.—, "all the time that was necessary to carry out the transactions was taken by petitioner. The fact that the lots were readily accessible for examination by prospective purchasers and that there was a seller's market enabled petitioner to make each sale with a minimum of time and effort on her part." Moreover, Robert did not include in his calculations the time that he spent in his law office drawing up sales contracts.

Petitioners rely on certain facts, significant in other cases, which aid them little in the circumstances of this case. That they did not advertise is of little importance. A seller's market made such activity unnecessary. *Estate of Luke J. Barrios*, *supra*; *Arthur E. Wood*, 25 T.C. 468; *J. Roland Brady*, 25 T.C. 682; *Shepherd v. United States*, 139 F. Supp. 508, affirmed *per curiam*, 231 F. 2d 445 (C.A. 6). For the same reason, their failure to improve the property in question is not significant.

Petitioners stress their intents and purposes at the time they acquired various properties, but the more significant question is for what purpose was the property held at the time of sale. *Rollingwood Corp. v. Commissioner*, *supra*; *Richards v. Commissioner*, 81 F. 2d 369 (C.A. 9); *Estate of Luke J. Barrios*, *supra*.

Moreover, even as to their intents and purposes at the time of acquisition, the record does not convince us of all that petitioners would have us believe. They would have us believe that many, if not most, of their acquisitions were motivated by altruism and civic and moral responsibilities. The evidence was not sufficient in some instances for us to make findings, and, in connection with other acquisitions, Robert's testimony is far from convincing.

Petitioners' frequent and continuing acquisitions and sales, their failure to indicate clearly more than a single transaction wherein they did not make a profit and their profits over a period of years persuade us that the testimony attempted to prove too much.

On the basis of the whole record we conclude, and have so found, that the real property sold by petitioners was held by them primarily for sale to customers in the ordinary course of their trade or business.

Decision will be entered for the respondent.

Served: April 24, 1958.

The Tax Court of the United States
Washington

Docket No. 57111

ROBERT E. AUSTIN and MARIAN H. AUSTIN,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, filed April 24, 1958, it is

Ordered and Decided: That there are deficiencies in petitioners' income tax for the years 1950, 1951 and 1952 in the respective amounts of \$395.96, \$429.46 and \$1,676.88.

[Seal] /s/ ARNOLD RAUM,
Judge.

Entered: April 28, 1958.

Served: April 29, 1958.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW

Petitioners, Robert E. Austin and Marian H. Austin, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that certain decision of the Tax Court of the United States in the above entitled matter entered on April 28th, 1958.

The decision appealed from is: That there are deficiencies in petitioners' income tax for the year 1950 in the amount of \$395.96, for the year 1951 in the amount of \$429.46, and in the year 1952 in the amount of \$1,676.88.

The controversy pertains to whether certain sales of real estate constituted sales of capital assets and consequently to be taxed at capital gain rates, or whether the sales were of property held for sale to customers in the ordinary course of a trade or business, so as to be excluded from the term "capital assets" as defined in Section 117 of the Internal Revenue Code of 1939.

Petitioners are and were during the years in question residents of Manhattan Beach, California. They filed income tax returns with the office of the Director at Los Angeles, California. The alleged deficiencies were assessed from the Los Angeles office. The trial before the Tax Court was had in Los Angeles, Manhattan Beach, California, and Los Angeles, California, are within the area of the United States Court of Appeals for the Ninth Circuit.

Dated: June 12th, 1958.

/s/ ROBERT E. AUSTIN,

/s/ WENDELL H. DAVIS,

Attorneys for Petitioners.

Notices of Filing Attached.

Affidavit of Service by Mail Attached.

[Endorsed]: T.C.U.S. Filed June 16, 1958.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 14, inclusive, constitute and are all of the original papers as called for by the "Designation of Record on Appeal" and "Designation of Additional Portion of Record on Review", including Joint Exhibits 1-A thru 4-D, attached to the Stipulation of Facts, and Joint Exhibit 5-E, admitted in evidence, in the case before the Tax Court of the United States docketed at the above number and in which the petitioners in the Tax Court have filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case as the same appear in the official docket in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 1st day of July, 1958.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, Tax Court of the
United States.

The Tax Court of the United States

Docket No. 57111

ROBERT E. AUSTIN and MARIAN H. AUSTIN,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

TRANSCRIPT OF PROCEEDINGS

Court Room No. 10, Federal Building, April 22,
1957—11:10 a.m.

(Met pursuant to notice.)

Before: Honorable Arnold Raum, Judge.

Appearances: Wendell H. Davis and Robert E. Austin, 401 Bartlett Building, 215 West Seventh Street, Los Angeles, California, appearing for the Petitioners. Gene F. Reardon, 1135 Subway Terminal Building, Los Angeles, California, appearing for the Respondent. [1]*

Proceedings

The Clerk: Docket No. 57111, Robert E. Austin and Marian H. Austin.

Will counsel please state your appearances, please, for the record?

Mr. Davis: Wendell H. Davis, attorney, and Robert E. Austin, also an attorney; Mr. Austin is

* Page numbers appearing at top of page of Reporter's Transcript of Record.

one of the petitioners and is appearing in pro per, along with myself.

Mr. Reardon: Gene F. Reardon for the respondent.

The Court: Proceed.

Mr. Davis: A brief opening statement, your Honor.

Opening Statement On Behalf of the Petitioner
By Mr. Davis.

Mr. Davis: There is only one question before you to be decided in this case. That is, whether certain real estate acquisitions of sales constitute investments or whether the petitioners were in the real estate business, the difference, of course, being as to whether income is to be taxed at capital gain rates, 50 per cent taxable, or is to be regarded as ordinary income.

We contend that because, among other things, of the facts and circumstances surrounding the acquisition of the property, and the manner in which sales came about, that the transactions were investments.

I will not go into the evidence at this time. We [2] will simply state that there has been a stipulation as to some facts and that the petitioner, Robert Austin, will testify as to others.

The petitioner, Mr. Austin, has been engaged as an attorney at law for over 40 years, has practiced here in Los Angeles with his office down town in Los Angeles, and that has fully occupied his time.

The petitioner, Mrs. Austin, is a housewife. I believe the stipulation covers her.

Opening Statement On Behalf of the Respondent
By Mr. Reardon.

Mr. Reardon: In addition, your Honor, the respondent has determined that the petitioner is also liable for self-employment tax for two of the three years before the Court, and the parties have stipulated that if the Court finds the petitioner was in the real estate business, then he is subject to the self-employment tax.

The Court: What is the statutory issue?

Mr. Reardon: This is 117-A which, in defining capital assets for the purposes of becoming subject to the capital gains rate, exclude property held in the ordinary course of business, and the respondent's business is in this position, that this property was acquired and sold in the ordinary course of petitioner's business.

The Court: Your description is rather loose. [3] Are you referring to that clause in 117-A-1, which refers to property held by the taxpayer primarily for sales to customers in the ordinary course of his trade or business?

Mr. Reardon: Yes, your Honor.

The Court: Is that the clause that's involved here or is that some other clause in 117-A-1 that's pertinent?

Mr. Reardon: Yes, your Honor.

Further on in the statute where the capital assets are defined, and the exclusion clause is defined.

If it please the Court, I could read the pertinent section of the statute:

“The property held by the taxpayer, whether or not connected with his trade or business, but does not include”—and this is Subsection A—“property held by taxpayer primarily for sale to customers in the ordinary course of his trade or business.”

The Court: Thank you. Do you wish to present the stipulation?

Mr. Reardon: Yes, your Honor.

Also, at this time, I would like to introduce Joint Exhibits 1-A through 4-D, which are the returns for the years involved, and we have had some difficulty with our Intelligence Unit in photographing them. They were rather busy and returned them to me this morning, and they weren't satisfactory. All [4] the pages are rather lengthy, so I'd like leave of the Court to submit these at this time and withdraw them at the conclusion of the trial, have them photostated, and return them to the Court within this week.

The Court: I don't want any photostats. I will receive the originals. You may withdraw them temporarily for the purpose of obtaining photostats for your own use, but I want the originals returned to the Court.

Mr. Reardon: Yes, your Honor.

(The document above-referred to were received in evidence and marked Joint Exhibits Nos. 1-A through 4-D.)

Mr. Reardon: In further explanation, your Honor, there are four returns involved for the three years, one being an amended return for 1951. There's no controversy over the amended return. In other words, it shows exactly the same thing that the original return does except for a mathematical mistake involving some taxes in issue that's not before the Court.

The Court: Proceed.

Whereupon,

ROBERT E. AUSTIN

called as a witness for and on behalf of the Petitioners, having been first duly sworn, was examined and testified as follows: [5]

The Clerk: State your name and address, please.

The Witness: Robert E. Austin. My business address is 215 West Seventh Street in Los Angeles. My residence is 500 Poinsettia Avenue in Manhattan Beach, California.

Direct Examination

Q. (By Mr. Davis): You are one of the petitioners, Mr. Austin?

A. Yes, I am one of the petitioners, and my wife is the other. The returns here involved are the earnings and income of the family, myself and my wife, and in California terms, that is all community income.

Q. Will you explain the reason for the amended return in 1951?

A. Well, in making the original return, we made a miscalculation, as Mr. Reardon so stated, in fig-

(Testimony of Robert E. Austin.)

uring up the amount of taxes to be paid. The error in computing the amounts of taxes paid was discovered soon after figuring the original return, and we filed an amended return to correct it.

That doesn't involve any matter that will be in issue here, as far as I can tell, and will have no bearing upon the issues—the issue that is before the Court.

Q. With reference to this schedule of gross income, do you want to make one explanation in regard to the 1952——

The Court: Are you referring to the schedule in the stipulation of facts? [6]

Mr. Davis: Yes, it has been stipulated that any item should be explained in reference to the profit on real estate sales.

The Witness: The profit on real estate sales there was taken from some figures supplied by attorneys for the respondent, which we accepted them without checking them until just a few minutes ago I looked them over hurriedly just since I came into court this morning, and I think there is an error there, but you check with Mr. Reardon.

I am not quite sure with that in view of the fact that the variance of a thousand dollars one way or the other in the amount of profit on real estate sales wouldn't make any difference with the decision, I think that we can waive that.

Q. (By Mr. Davis): Well, was that in 1952? Do you refer to your home place?

A. In 1952, the real estate sales profits there

(Testimony of Robert E. Austin.)

includes an item of profit on the sale of a home in which I had lived.

Q. The Commissioner conceded that that was a legitimately classed profit as a capital gains profit, that the amount of the profit arising from the sale of that home was included in the total for 1952?

A. \$1386.50. Yes, that was a profit on the sale of part of the home place which is conceded to be legitimately a [7] capital asset.

Q. What is your occupation, Mr. Austin?

A. My occupation is a lawyer. I have been practicing law in Los Angeles—I was admitted to practice here in 1912, and have maintained an office, and have devoted my time and energy to the practice of law at all times since then.

Q. Your office has been at all times in Los Angeles?

A. Yes.

Q. Do you devote any of your time to running other activities?

A. Well, in recent years I have been devoting a little time to some civic matters that I have become involved in, but they have no business significance, there is no income arising from them, though they do consume a substantial amount of my time.

Q. What is the nature of those activities?

A. Well, for several years I have been a member of the School Board. I assisted in the organization of some of the Water District in our area there, and have been a member of its Board of Directors for about ten years. I am also a member of the Board of Directors of the Metropolitan

(Testimony of Robert E. Austin.)

Water District, which is the water agency in this part of the country that brings water across from the Colorado River to Southern California, and in connection with that, I have had some assignments on various committees trying to work out some [S] of its problems.

Q. Your law practice, together with these other activities, they take up your full time?

A. They do. I am in the office part of every business day, and I maintain a regular schedule for the practice of law just the same now as I did 40 years ago.

Q. I am now going to show you a series of deeds, original deeds, to real estate, which have already been shown to counsel for the respondent, and I would like you to please tell the Court the facts and circumstances surrounding the acquisition of this property.

I believe counsel have agreed that these need not be introduced into evidence but they can be used as a convenient means of describing and talking about the various properties involved here.

I first show you nine deeds, all of them in the City of Manhattan Beach as grantors, to Robert E. Austin and Marian H. Austin, grantees, and they describe certain real property in the City of Manhattan Beach.

I ask you if you can recognize those deeds.

A. I do. These deeds and one other, I have been unable to find—these conveyed to me 102 lots by the City of Manhattan Beach. The conveyance was

(Testimony of Robert E. Austin.)

made in 1945 and '46. They arise out of a transaction in which some of my neighbors and I, in an effort to help the City of Manhattan Beach, held [9] on a tax roll quite a substantial amount of property to assist the City of Manhattan Beach to get on the tax roll a large number of lots in the city which were off the tax roll because they had been sold for taxes, and were then owned by the State of California.

We figured over several different methods at different times to get these properties back into private ownership, and that resulted in an agreement between myself and three or four others to guarantee the city against any loss it might incur if it proceeded under a law that had recently been enacted allowing municipalities to acquire title to tax deeds of land and use it for civic purposes, or sell it, or otherwise handle it.

The process of selecting the land and making the arrangements with the different governmental agencies having interest in them was an expense of \$3000.00 or \$4000.00, maybe \$5000.00, on the entire group. The city at that time was small, had a small assessed valuation, and the officials regarded that expenditure as being rather heavy unless they could be guaranteed against loss.

I joined three other parties in guaranteeing that the city would be able to sell the property or that we would pay the loss. That worked around during the year 1944 and '45, and finally it was determined by the city officials that they couldn't sell

(Testimony of Robert E. Austin.)

the property and wanted me and the others to [10] make good on our guarantee. This would have been somewhere about \$2000.00 or maybe \$2500.00 of a loss, so we finally determined that those others who had guaranteed the city against the expenses there would buy from the city at its cost.

The lots that were involved resulted in me being assigned the lots covered by these deeds, which I think is 102 lots. I paid the city for them.

Well there was one transaction by which this came about, the city deeded the lots to me a few at a time as it was able to get the consent of the other tax agencies for the release of particular lots, so that was the method by which I acquired that property. The city had held an auction sale or two on all this stuff a month or two before it was finally agreed that I would take this 100 lots. They sold some of them. In fact, I bid to encourage the sale.

The lots were not marketable then, and the price I paid for them, I think, was their full price, but I regarded it as being an investment that could be expected to pay off some time in the future.

Q. Well, these were all vacant lots, were they?

A. They were vacant lots.

Q. And you still own some of them?

A. Yes, I still have some of the lots that nobody wanted, yes. [11]

Q. During the time that you have held these lots, did you do anything in the way of advertising them for sale?

(Testimony of Robert E. Austin.)

A. No, I never did. All the sales that came about here originated by reason of somebody calling my house on the telephone and asking if we had such and such lots and if we would sell them. I think there were many calls that came in. My wife received the calls and told me about them. Sometimes we received postcard inquiries, and occasionally letter inquiries. I think I responded to those calls whenever they came and gave the inquirer a price on the lots. Sometimes we discussed the terms of the sale, whether it had to be cash, or whether I would take a contract for the lot or trust deed or something of that kind.

Q. Did you improve any of the lots?

A. No, I didn't improve any of the lots that had been sold; I improved some that I now have which are still on hand, but none that I sold.

Q. I next show you a deed from the Amaranth Land Company covering some 21 lots, Redondo Beach deeds, dated July 24, 1946. Do you recognize that?

A. Yes, I do. I acquired this from the Amaranth Land Company, and the circumstances of that acquisition were these: Mr. Hartranft had been my client for many years and——

The Court: What is the date of this transaction?

The Witness: This deed here, your Honor, is dated [12] the 24th day of July, 1946, and it involves 21 lots.

Mr. Hartranft had been a client of mine for

(Testimony of Robert E. Austin.)

many years, and when he died, he left several pieces of business unfinished, among them a joint venture, and in some real estate activities in Redondo Beach. Redondo Beach is two or three miles from Manhattan Beach where I live.

The family was short of funds and it was desired to liquidate this joint venture. There must have been four or five other people concerned in it, and none wanted these lots, but it was finally determined that the people who were interested in the joint venture would have a meeting around December, and would determine what to do with these lots.

The arrangement was that we'd sell them to the highest bidder in that group. I conferred with Mrs. Hartranft, and she wanted me to represent her, and I did.

We finally determined that she didn't want the lots, but that we didn't want somebody else to get them for nothing, so it was agreed that I should go there and bid the price of those 21 lots up to \$2400.00 in the hopes that somebody else would take them along. We thought the lots were worth more than that, but there wasn't any ready market for them.

I attended that meeting and we had quite a conference in which we disposed of some of the other business of the joint venture, and then we started to discuss the lots. We bid on them. I think the bid started off about \$1000.00. [13] I followed the bidding along until the bidding got to \$2400.00.

(Testimony of Robert E. Austin.)

I reported to her that we had bought them in at that price. She was much disappointed because she needed cash. She said she hadn't authorized me to bid \$2400.00. She wanted to boost the price so somebody else would buy it. I was so embarrassed by her attitude there and also by the fact that the other parties present would have a feeling that I hadn't been quite fair with them if I had reported making a mistake and didn't have the authority for the bid, so I proposed to Mrs. Hartranft I pay that \$2400.00 and take the lots. She didn't care who paid in the money, who got the lots, just so it wasn't her, and in accordance with that, I came along and paid this \$2400.00 there that I had to bid on the lots for Mrs. Hartranft, and they gave me this deed here which conveyed the title to myself and my wife.

That accounts for 123 of the lots listed in the stipulation.

Q. (By Mr. Davis): You mean the 21 together with the first group? A. Yes.

Q. Going back to that first group of lots for a minute, can you explain to the Court why the deeds bear different dates, the nine deeds? They range from August 16, 1945 to November 8, 1946.

A. Well, the city, in order to convey title, was [14] required to get a relinquishment from each of the other taxing agencies that had a tax lien against the lots. That included the School District and the County of Los Angeles, and the County Flood Control, and the Metropolitan Water Dis-

(Testimony of Robert E. Austin.)

trict, and they didn't release them all at once. They released apparently a few at a time.

Anyway, every little while, they notified me that they had a deed for me and delivered it, and I wrote the checks in that way, except that in the beginning I gave them a check, I think, for a hundred lots that they had, but they weren't able to deliver them all at that time, so they returned that check, and I gave them individual checks for each of the lots as they came through.

Q. Now, directing your attention to this second deed, FT-121, do you still own some of those lots?

A. Yes. Well, I still own a lot of lots I got from the City of Manhattan Beach.

Q. Now, the second group of lots there from the Amaranth Land Company, which you described in regard to Mr. Hartranft, do you own some of those lots?

A. Yes, I still own three or four of those lots.

Q. Those you have sold, did you advertise them for sale?

A. No, all those sales, like the others I have been telling you about, originated by reason of somebody making an inquiry. Those inquiries usually came into the home there [15] on the telephone.

The telephone is in my wife's name, and my wife's name is on the deed, and the inquirer would locate that address, and inquire at the Tax Collector's office to see who owned the lot.

Q. Did you list them with a real estate broker?

(Testimony of Robert E. Austin.)

A. No, I never listed any of these lots with any brokers.

Q. Did you ever put any signs up on them?

A. No, I never put up any signs.

Q. I will next show you——

The Court: Were any of the sales made through a broker?

The Witness: Why, yes, frequently I got a call—— got a call from a broker. In fact, Mrs. — well, I don't know most of them, but a good many sales are on the telephone. A broker would call me on the telephone and ask me for price and terms and conditions of sale, and I always gave a broker the same kind of answer I gave to anybody else: I had the lots on hand, and if somebody wanted them, I'd be glad to turn my land into money, and so——

The Court: Well, the brokers knew they were for sale?

The Witness: Probably, in some cases, they did, but in the initial cases they all found that I was the owner by reason of contacting the Assessor's office. [16]

Mr. Reardon: This is hearsay testimony. I object.

The Witness: The original contacts were made through somebody sending a card to the house addressed to myself and my wife, or making a telephone call to the house. The phone is listed in her name, and her name is on the deed, so that I never listed any of the lots with any of them.

The broker who had made a purchase for them,

(Testimony of Robert E. Austin.)

a client in one case, sometimes knew that I had other properties, other lots, and some sales were made that way by him calling back for others.

Q. (By Mr. Davis): I next show you a group, R. E. and Elizabeth Crabtree, husband and wife, to Robert E. Austin and Marian H. Austin. These are dated July 31st, 1944, and describe certain acreage in San Bernardino County on two of the deeds. Riverside County is on the other deed.

Do you recognize those deeds?

A. Yes, I recognize them. I got these from Mrs. Nelson, whose name doesn't appear on it. She gave me this deed for a fee for some services, and I think the Crabtrees were nephew and niece of hers.

She had given me this deed of trust on a piece of land in Riverside County for a fee she owed me. She hadn't been able to pay it, and she sent her nephew and niece in to see me, and I accepted these deeds in payment of that debt. [17]

I later went out to look at the property. I thought it wasn't any good. I never paid any taxes on it, and after a while it was sold, for the taxes—so I got nothing from these although these deeds are part of the list that's given in the exhibit—in our exhibit here.

The Court: Will you identify them in relation to the stipulation?

The Witness: Paragraph 5 of the stipulation.

Mr. Reardon: May I interrupt, your Honor? In connection with that, respondent and petitioner

(Testimony of Robert E. Austin.)

had a joint exhibit they were going to introduce. It keynotes the lots by number, or these transactions.

The Court: They may be helpful. I am inquiring now in relation to the stipulation in fact.

The Witness: Well, these deeds were recorded August 10, 1944, and they describe——

The Court: Are they included in Paragraph 5 of the stipulation of facts?

The Witness: I think they are, if I can see that stipulation. Yes, they are.

The Court: Paragraph 5 details two transactions of purchase involving five lots.

Are those the deeds that you have been testifying about?

The Witness: Well, these three deeds here describe [18] three lots—three parcels.

The Court: Are those three of the five in Paragraph 5 of the stipulation?

The Witness: Yes, these are three of those five.

Mr. Davis: I think, at this time, we might introduce this schedule that shows the profits and sales during the three years in question here, 1950, 1951, and 1952. It also shows income from other lots that came in during these years. These other lots had been sold previously.

Altogether, there are 35, including the previous sales in the years before the three years here involved.

This schedule was prepared by somebody from the Internal Revenue Bureau originally.

(Testimony of Robert E. Austin.)

The Court: Are you bringing in a joint exhibit?

Mr. Reardon: Yes, this is the Department of Revenue's original calculation—the agent's original calculation of the transactions by the petitioner in the three years before——

The Court: It will be received.

The Clerk: No. 5-E.

(The document above-referred to was received in evidence and marked Joint Exhibit No. 5-E.)

Q. (By Mr. Davis): I next show you a deed from Adolph Riniker to Vera T. Greene, dated August 22, 1944, Lots 15 and 16, Block 21, of [19] Redondo Villa Tract, and a second deed dated July 24, 1946, from Ace S. and Gladys H. Conn to Vera F. Greene for Lot 13, Block 21, of Redondo Villa Tract B; a deed from Vera F. Greene to Robert E. Austin and Marian H. Austin, dated October 31, 1945, for Lots 15 and 16, and Lot 13; and deed from Vera F. Greene to Robert E. Austin and Marian H. Austin, dated July 25, 1946, for Lot 13 in Block 21 of Redondo Villa Tract B; and a deed from Frank H. Cole to Robert E. Austin and Marian H. Austin, Lot 14, Block 21, Redondo Villa Tract, dated July 19, 1946.

I ask if you can recognize this group of deeds.

A. I do. Our home at that time was on the west side of Rowell Avenue in Manhattan Beach. These lots immediately across the street from us were at that time vacant. They were lots 15 and 16, and 13 and 14, Block 21.

(Testimony of Robert E. Austin.)

The area wasn't very well built up at the time. There was considerable agricultural activity there, and my wife suggested to me that we ought to acquire the property immediately across the street so somebody wouldn't put in a stockyard there or something of that kind, and so I set about to acquire those lots, and this deed from Adolph Riniker, dated 1944, involving two lots is property that I acquired from him in an effort to protect our home in that way, that I took that property—that deed in the name of Vera F. Greene, who was then my secretary, so that it didn't expose the buyer, [20] that I was seeking to buy that for myself.

I called him on the telephone and wrote him some letters about it, and in the course of time, why, he sent me the deed to Vera F. Greene. That deed is dated the 22nd of August, 1944, and in October—October 31, 1945, she deeded those lots to myself and my wife. Now, I don't know whether this transaction appears on the list here as 1944—a transaction in 1944 or for 1945. It probably appears in '44, but I am not sure about that.

Now, these other two deeds here with Ace S. Conn on Lot 13. That was also one immediately across the street from us. I took that deed in the name of Vera F. Greene in the same way. I had contacted them to see if I couldn't buy the lots for the purpose of taking care of our home there, and that deed, through Vera F. Greene, was recorded in '46. She deeded the property to me and my wife, and that deed was also recorded in '46,

(Testimony of Robert E. Austin.)

so that those two lots—or that lot appears as one of the transactions in '46.

Another one now that appears in '46 is the other one of those four lots which I bought from Frank H. Cole. That deed is recorded in July, 1946. That runs to myself and my wife, and had some business with Mrs. Cole—that's a woman, that name "Frank"—

Q. This property now has been sold or do you still own it? [21]

A. When we sold our home there on Rowell, we then sold this.

The Court: Are those sales included in the sales that were made during the years before the Court now?

Mr. Davis: No, I don't believe all of these—I might say that—I don't believe all of these sales were, but the stipulation there takes into account other years, and the respondents have seen fit to include in their schedules and offer of stipulation sales for other years and acquisitions, and so we have consented that we go along on that basis to give you a clear picture of the years in question.

The Witness: If I had before me that exhibit I could tell you whether these lots are included. I think these were made in 1951, either 1951 or '52.

Q. (By Mr. Davis): Well, how were these sales made?

A. Somebody called me up for a price on the property, and a discussion on terms was discussed,

(Testimony of Robert E. Austin.)

and then a little bit later the buyer who was a builder, whose name I think appears on that exhibit that you just brought in, and I completed that transaction with him.

That was done by telephone, writing, and I never did see him until after the sale was completed, and I met him over near the property where he was building some houses.

Q. I next show you a deed on Pacific Land and Title [22] Company, to Robert E. Austin and Marian H. Austin, dated March 24, 1945, and covering Lots 6 and 7, Block 2, Tract 142; and Lots 21 and 22, Block 5; and Lot 24, Block 37; and Lots 16, 17, 18, and 21, Block 64, Redondo Villa Tract B, and ask you if you recognize that deed.

A. I do.

Q. Can you explain about it?

A. That came about like this: I was a member of the community group there. They call it the Manhattan Beach Property Owners Association, in which they do little things around to improve the properties, and improve—get some streets, and so on, and they took up the acquiring a park near a place where they had a building, and I was appointed on that committee to see what we could do about that.

I discovered that the Pacific Land and Title Company owned Lots 21 and 22 in Block 5, which was a part of the area that we desired for the city to acquire for a park.

I contacted the manager of the business and

(Testimony of Robert E. Austin.)

proposed that he should give the lots to the city, but he wasn't ready to do that, and unless we did something for him, and so it worked out this way: He'd get the lots for the city if I'd buy the other three lots here. The price there is \$575.00. I thought the lots probably were not worth that, but I figured the city could pay for the lots 21 and 22, so I bought from him for \$575.00 the lots that you have just described. [23]

The Court: Are they—are these lots included in the 69½ lots?

The Witness: No, this is just a matter of eight lots, apparently. That is, in addition to this.

This wasn't acquired from the City of Manhattan Beach; this was acquired from a private owner.

The Court: In what year?

The Witness: In 1945.

The Court: This is not going to be very meaningful to me.

Your stipulation in effect sets forth three transactions in 1945 resulting in the acquisition of 69½ lots. Now, we have testimony about eight lots, and I don't know where they fit into this picture, and I suggest to counsel he try to button it up.

Mr. Davis: We will ultimately cover all of the lots there in the stipulation. We go through so many different transactions here.

The Court: Well, your answer is not helpful to me.

I point out to you again that the stipulation sets forth the acquisition of 69½ lots in three transac-

(Testimony of Robert E. Austin.)

tions. A fair reading of that tells me that those transactions constituted all of the transactions in which this petitioner acquired lots in 1945. Now, he is telling me about eight lots which he seems to suggest that they are not included [24] in these 69½ lots, and leaves the matter way up in the air.

Mr. Davis: Well, what we are trying to do is cover all of the acquisitions to give the Court a general picture for many years, beginning back——

The Court: Well, the burden is upon you. If you don't make it clear, you will have to take the consequences.

Mr. Davis: May I make a suggestion to the Court, your Honor, This Paragraph 5 was compiled by the respondent here and offered to us. I must admit that I didn't check it very carefully, but I thought that was about right. During the years when this was under discussion, we went over my books and records, everything, so that I had no doubt that their figures would be right in every respect. Now,——

The Court: Well, I call your attention to the fact that the purpose of the stipulation is to remove from trial matters that are agreed to, and when you file a stipulation with me, I assume that it contains the facts that the parties have agreed upon. I don't want to hear any testimony in contradiction of the stipulation.

Mr. Davis: Well, is that the purpose of this testimony?

(Testimony of Robert E. Austin.)

The Court: Well, I thought the witness was suggesting that the stipulation is not accurate.

Mr. Davis: Whatever acquisitions and sales there are, we want them before the Court with the facts and [25] circumstances of the acquisitions and the sales, and, of course, whether it was in one year or another wouldn't be too material, I don't believe. It's a matter of an over-all picture here of the three years.

The Court: It may be a matter of an over-all picture, but a picture I have got to understand before I decide this case, and you are presenting me with a fuzzy record.

Mr. Davis: Well, we will endeavor to clear it up, your Honor.

The Witness: May I volunteer, your Honor, the thinking in our mind and I think in the respondent's was that the question here is whether or not the type of activity constituted a business.

Now, that being the case, why, we didn't realize it would be vital or fatal if we made a mistake of a sale or two in one year or another. That is, the sale ought to be in one year, and happened to get, in this list, in another. We didn't figure that was important.

We also figured that these facts being presented by the Commissioner would undoubtedly be corrected. We don't think that what I have testified to here presents any variation of the facts that your Honor must know and consider to decide this case.

The Court: Proceed. [26]

(Testimony of Robert E. Austin.)

Q. (By Mr. Davis): I will show you three deeds from the North Angeles — strike that — two deeds from the North Angeles Land Company to Robert E. Austin and Marian H. Austin; one deed is dated April 10, 1947, and it is Lot 206 of the Western Empire Tract, and in the City of Los Angeles; and the second deed is from the North Angeles Land Company to Robert E. Austin and Marian H. Austin, Lot 303, Western Empire Tract, City of Los Angeles. That's dated April 10, 1947; and a deed from Ambrose Collette to Robert E. Austin, and Marian H. Austin, dated March 24, 1947, Lots 7, 8, 9, 22, 23, and 24, Block 23 of Tract 142.

I ask you if these relate to the same transactions——

A. North Angeles Land Company and conveyed to myself and my wife, title to the Lot 206, the Western Empire Tract, and a part of Lot 203 of the same. One of Mr. Hartranft's ventures, who I mentioned, and they were liquidating this corporation, and I thought that that property up there would probably be a good investment, so I bought from them as part of that liquidation, and also as a part of the payment of my fees 125 acres that is represented by these two deeds.

I intended to own that property for many years, and have just recently sold it. That was bought during the period covered by the list of purchases shown in Paragraph 5 of the stipulation here, but it was not sold during the period covered by our controversy here.

(Testimony of Robert E. Austin.)

The Court: It is reflected in Paragraph 5? [27]

The Witness: Yes, your Honor. That is part of the purchase.

The Court: For what year?

The Witness: 1947.

The Court: 1947 shows six transactions with the acquisition of 16 lots.

The Witness: Yes, your Honor.

The Court: And how many acres are involved here?

The Witness: Well, this is part of two different lots and 125 acres included all of this. This is up on the mountainside here in the northern part of Los Angeles.

The Court: Do you refer to a tract of that sort as a lot?

The Witness: Well, this isn't a tract, your Honor; this is some acreage, some 125 acres of land. The land, originally, your Honor, was surveyed here in this very large tract, and this Lot 206, I think, includes about 70 or 80 acres; Lot 203 was, as I recall, 60 acres.

This other deed that you have shown me is also involved in the purchase for 1947. My wife thought this would be a good place for a home, so we bought this property from the owner here in 1947, built a house on it. We are living there now. That's part of the home place. There are six lots in this purchase. These are small.

As far as acreage, these lots are 25-foot lots and [28] six of them make a satisfactory building site.

(Testimony of Robert E. Austin.)

Q. (By Mr. Davis): You presently reside there?

A. Yes, that's my home where I now live.

Q. I next show you a deed from Robert J. Tracy and Dorothy G. Tracy, dated April 28, 1948, and pertaining to Lots 5, 6, 16, and 17 in Tract No. 2143.

I ask you if you recognize that deed.

A. Yes, I recognize this. This was recorded in April, 1948. It describes four lots and is part of the property described in Paragraph 5 of the stipulation.

About the time we had sold our home on Rowell Avenue, we hadn't yet decided to build on the Collette lots, and so we bought this lot from Tracy which had a house on it, and we moved in there, and that was our home for a considerable period after that. I think later that year we built on the lots that are at the present address, 500 Poinsettia, and we sold the Tracy property after we moved in there.

Q. Did you make a profit on that transaction?

A. I am not sure. I rather think that we sustained a small loss there, but I am not quite sure about that. Anyway, that was just moving into one home from another.

Q. I next show you a deed from Gordon W. Hosking and Marie Hosking, husband and wife, dated March 31, 1947, and covering Lots 1 and 2 in Block 53 of Redondo Villa Tract B. [29]

A. Marie Hosking had lived with us for several

(Testimony of Robert E. Austin.)

years before she married. She was growing up with us, and married a young man in 1946.

I had helped them buy a home, and done several little things to help them get along. Somebody came along and offered to sell to me two lots, these two lots here, in a part of town that was near where they were living. I thought it would be nice if they had a little real estate so they could feel they were a substantial part of the community.

The house that they were living in, I had bought that, it was in my name, and so they were living in it, and so I thought this would be a good thing, and I bought these two lots, and put them in their name and expected them to pay for it whenever they got around to it.

After a while Gordon lost his job, and they deeded the lots back to me in 1947, and I presume that is one of the sales that appears in this Exhibit 5, but I am not quite sure whether that was the year that I bought it for the Hoskings or whether the date they deeded it to me. In any event, that's the facts relating to the acquisition of that property.

Q. What became of that property?

A. Well, later on a real estate dealer, whom I have come to know pretty well, called me up to inquire whether or not I owned those lots, and whether they were for sale. I told him they were and gave them a price on it, and I sold them [30] almost immediately for the price I quoted.

Q. Did you ever advertise the property for sale?

(Testimony of Robert E. Austin.)

A. No, I didn't advertise this, or any other of the properties I have owned. I let it take care of itself the best it could.

Q. I show you a deed from William R. and Adella Unfug, dated October 18, 1946 on Lot 21, Block 2 of Tract 142; and a deed from Charles Terry to Vera F. Greene, dated February 28, 1947, Lots 19 and 20, Block 2, Tract 142; and a deed from Vera F. Greene to Robert E. Austin, and Marian H. Austin, dated April 1, 1947, covering that same two lots as mentioned in the last deed.

Do you recognize those?

A. Yes, at that time I owned Lots 6 and 7 in the same block. These three lots were immediately behind it. Lots 6 and 7 were facing on Manhattan Beach Boulevard, and I thought they had considerable potential there for business uses, and that in order to make good use of that property, it needed some parking space, and so one of my neighbors was a real estate man, and one day came in and asked me why I didn't buy the lots, so I told him I would be glad to do so at a reasonable price. He reported back a day or two later that he could get that lot for whatever it was, and he thought that he could get the two adjacent. I told him I'd be glad to buy all three of them for a satisfactory price to make a parking area for the [31] Lots 6 and 7 for any business that might be established there.

Somewhere along the line about the time of these deeds are dated, why, he came in and with the nec-

(Testimony of Robert E. Austin.)

essary arrangements, and I bought from William Unfug Lot 21. That deed is recorded in November, 1946, and I think that it's one of the purchases required that's listed here. And the other lot was purchased—I purchased that in the name of Vera Freene. I didn't pay the full amount of the purchase price there, and so I took it in her name. She executed the trust deed for the balance of the purchase price, and I paid it off later on. She deeded the two lots to me. Those are the Lots 19 and 20 in Tract 142, which backs up Lots 6 and 7 that I have just mentioned. Those lots, I continued to own them until here about a year ago. At that time my wife was interested in one of the churches there and we gave Lots 6 and 7 to the church, and we sold them I guess you'd say, the other three lots which we thought they would need for parking, the rest of the church yard, so that was sold and disposed of in that way.

Q. I show you a deed from Fred H. Kochsmeier and Alvina Kochsmeier to Robert E. Austin, dated March 12, 1947, pertaining to Lots 17 and 18, Block 60 of Tract 1638.

A. I owned Lots 13 and 14. That's part of what I got from the City of Manhattan Beach in this same block, and Lots 17 and 18 back up to them, so that it gave an entrance to those [32] lots from a side street, and also furnished a little bit of parking space, and this same broker who sold me the lots I have just mentioned in Tract 142 came in and offered to sell me these lots after I bought them

(Testimony of Robert E. Austin.)

from him to fill out or build up the site we had there on the north side of Manhattan Beach Boulevard so to give them a street access from side streets and also for a little parking space.

I bought that in 1947, and then I think, that, is one of the deals that's described in 1947, two of the lots there.

Q. What disposition was made of that property?

A. Here about a year ago I sold the four lots to a broker there who has since improved it.

Q. Did he contact you about the sale, or did you——

A. Yes, he had an office close by and came over to my house one evening to see me about that, to see if I would sell it. I gave him a price on it. We talked about it a little. He said he would take it if I would give him a little time. He wanted a day or two. A day or two later, we signed up some papers in escrow somewhere, and the deal was completed in that way.

Q. He bought it for himself? A. Yes.

Q. I show you a deed from a Frank Perry and Marian F. Perry to Vera Freene, dated March 12, 1947, Lots 34 and 35, of Block 109, Redondo Villa Tract B; and a deed from Vera F. [33] Greene to Robert Austin and Marian H. Austin for the same lots, dated May 26, 1947.

Do you recognize those deeds?

A. I do. The real estate broker down there came in to see me to see if he couldn't sell me those lots. He gave me a good talk and I thought it was a good

(Testimony of Robert E. Austin.)

investment, so I took them in the name of Vera F. Greene because, in fact, the seller was a lawyer whom I knew very well and I wasn't ready to pay the full amount in cash, so I took it in the name of my secretary, who executed the trust deed for it, the unpaid balance of the purchase price.

The other deed now, she executed. That was paid off and cleared up.

This purchase was made in March, 1947 and deeded to me along in June, 1947. I still have those lots. I put a building on them, and that's been a fairly good investment.

Q. You hold them today as income property?

A. Yes.

Q. I show you a deed from H. L. Byram, a tax collector of Los Angeles, to L. Kathleen Smale, dated August 15, 1947, Southwest 50 feet of Lot 10, Tract No. 1272; and a second deed from H. L. Byram to L. Kathleen Smale, Lot 7, Block 11, Tract 1638. That's dated August 15, 1947.

I will ask you if you recognize those deeds.

A. I do. Mr. Clendenmin had been a client of mine for [34] many years. He came into my office and told me his daughter had bought some titles and that he was afraid she was going to lose some money on it, and he wanted to know if I couldn't help her out. I discussed the matter with him a little, and told him that I thought he probably could clear up the titles and get out all right.

About a week later he came in and said he had just been to a doctor and the doctor said that he

(Testimony of Robert E. Austin.)

had been troubled with a heart condition for quite a little while. The doctor told him he was in bad shape and that he might just drop off any time.

He didn't want to leave Kathleen with a deal of this kind on hand, and he wished that I would take it over so as to relieve him of that worry. We talked around a little, and I finally told him I would give him \$500.00 for it, which I did. Kathleen gave me a deed for it. Mr. Clendennin died in about 30 days.

I went out to look at the property and I didn't think it was a very good investment. One of the lots involved was taken on a street improvement bond; the other one had a bond against it, and quite a little other taxes that weren't included in the county deed. I determined that that was valueless, and decided to abandon it.

But, about a year or a year and a half later, somebody called me on the telephone and made an offer there [35] that I thought was pretty good, so I checked on that, so I found that I could clear up the title to the property for about \$1100.00. They were willing to give me about \$2000.00 for it, so I got the title cleared up by paying off the bond and other tax liens, and sold it there for about \$2000.00. I don't know who the buyer was, but I remember they called me on the telephone and that consummated that deal in escrow somewhere. The papers were signed by myself and my wife and mailed out, and I never did see the buyer.

Q. Where are deeds from this Smale to you and your wife?

(Testimony of Robert E. Austin.)

A. Well, I don't know, if you don't have them. I presume they are mislaid some place, and anyway I don't remember where they are.

Q. I next show you a deed from George H. Jones and Nelvina Jones to Robert E. Austin and Marian H. Austin, dated January 15, 1949, for Lot 12, Block 58.

A. Yes, I recognize this. Had built a building on the corner diagonally across the street from this, operating a laundry there.

We needed a little more space for some cesspools to take care of it, and we needed some parking, so I bought this lot from Mr. Jones. I happened to know him.

I went over to him and bought the lot from him and had it for the laundry for refuse disposal and for parking. We used that lot in connection with that building as long as [36] I owned it. That building was sold here about a year ago. Somebody sold this lot along with it. The sale of the building and lot was made through a broker who came by wanting to know if he could sell it for me.

Q. I show you a deed from Homer E. Deaver to Robert Austin and Marian Austin, dated November 21, 1950, for Lot 14 in Block 22, Redondo Villa Tract B.

A. Oh, Mr. Deaver was a friend of mine and a neighbor. This lot was directly across the street from where I lived on Rowell Avenue for quite a while.

I loaned him some money and took a deed of trust

(Testimony of Robert E. Austin.)

on this property. After a while, he got in bad circumstances, and he wanted to give me the property in lieu of paying the debt. I think we worked out some kind of deal. I paid him some money. I forgot just what now, but anyway in 1950, he gave me a deed to the lot and this is one of the transactions, I guess the only transaction—big transaction that occurred on this schedule in 1950.

So, I bought that later on. I sold that to a builder who had looked over the books and came to my house one night and said he would like to buy it. He described the lots he'd like to have, and I sold him this along with some other five or six others in one transaction there, perhaps along in '52 or—I don't remember the date. If I had this Schedule 6, I could tell which deal that was. [37]

Q. I show you three deeds all pertaining to Lots 12 and 13, Block 37, Redondo Villa Tract B, one from Jeanette Harris to V. F. Greene, August 31, 1945; one from Joseph Brown and Fanny V. Brown to V. F. Greene, dated August 28, 1945; one from Naomi Newman, dated September 11, 1945.

I ask you if you can recognize these deeds.

A. Yes, I had a client, Mr. Friedman, who acquired these lots, and they were deeded to Vera Greene, my secretary, for his convenience. I had some business with him, and he turned over these lots to me in working out some of our settlements, perhaps fees, or some other investments we may have had. And these were also sold also as a part of a deal with a builder. I don't remember who it was

(Testimony of Robert E. Austin.)

or how I got in touch with him right now, but anyway I sold them. I never made any effort to sell any of these lots except to respond as the inquiry came about.

Q. I show you a deed from the Pacific Land and Title Company to Robert E. Austin, dated May 22, 1948 for 8, 9, and 10, Redondo Villa Tract——

A. I think that Mr. Morrow, the owner of this business, called me on the phone and stated that he had these three lots on hand and was willing to sell them awfully cheap and he wondered if he couldn't interest me in them. He told me where the lots were, and what the price was, and I agreed to buy them. [38]

Q. Did you have a client by the name of Randall? A. Yes, I have.

Q. Did he have anything to do with these?

A. Well, no, I don't think so. There are some other deeds there. I think Mr. Randall represented him in some matters, but my best recollection is that I bought these direct from Morrow there on an offer that I thought was pretty good.

Q. I show you two deeds from H. L. Byram, Tax Collector of Los Angeles County, one to Robert E. Austin, dated November 22, 1943, Lots 18 and 19, Block 64; and the second the 22nd day of November, 1943 also, and it's from the same party to the same party, Lot 40, Block 180.

A. This Lot 18 was part of a tax delinquent in Manhattan Beach they were trying to get on the market. We had agreed that several of us would go

(Testimony of Robert E. Austin.)

to the Tax Collector and ask him to put lots on the scheduled sale that was coming along and we had agreed that each of us would put—the Tax Collector wouldn't put on the sale unless somebody agreed to be there to make an opening bid on them, and so part of that — as part of that deal, I went up and asked them to put a schedule of sale there on ten lots. We agreed to be there at the sale to make an opening bid on each of them.

I bid on them, but somebody else took bids up, so the only one I got out of it was Lot 18, Block 64. That was [39] in 1943, and I continued to own that until somewhere along in, I think, 1952 or 1953 when I sold that. That lot was, I thought, almost worthless, but I did my duty to the city and carried out my agreement there. In fact, right along that line, why, I did that same thing on two or three other sales and I suppose maybe it was a means of selling them, 30 or maybe 40 of those lots, but I didn't have to buy any of them except that one.

At that same sale, at the time that same sale took place, a client of one of my associates was there bidding against the property. He told me that he had run out of money and asked me if I wouldn't bid on Lot 40, Block 180. At his request, I bid on that lot at that sale. He didn't reimburse me the next day, but some time later he gave me back \$14.50, which was half of the purchase price, and he said that we'd own the lot together, and he'd find a market for it and make me a little profit.

He never did sell it, and so about five years later,

(Testimony of Robert E. Austin.)

he came to me and told me it was up for sale for taxes and he gave me \$10.00 for a deed to it. I gave him a deed for \$10.00, and haven't had word of it since. So, that's the disposition of that lot.

The Court: I am going to recess. We will reconvene at 2:00 o'clock.

(Whereupon, at 12:30 p.m., a recess was taken until 2:00 p.m. of the same day.) [40]

Afternoon Session, 2:00 p.m.

Whereupon,

ROBERT E. AUSTIN

called as a witness for and on behalf of the Petitioners, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Davis): Mr. Austin, are there any other deeds pertaining to the property included in the stipulation covering the 14-year period back to 1943 that have not been presented here?

A. Well, I don't know whether there are or not. It seems there's another deed or two, but I didn't realize that would be a material fact here, so I didn't make a careful search for them before I came. My impression was that the mode of operation would be the subject of inquiry here.

Q. Whatever other property there might be included in the stipulation was acquired in a similar manner?

A. Yes, along through the years, every once in a

(Testimony of Robert E. Austin.)

while, I have acquired a piece of a property by a fee or something of that kind. Once in a while, maybe I perhaps bought something I thought was a good buy, but I don't recall any of those that aren't included in the list here.

Q. What percentage of time did real estate acquisitions [41] and sales take in comparison with your law practice?

A. Oh, I'd say that it was infinitesimal, probably less than one percent of my time on this. Ordinarily, the sales were made—the purchases were made ordinarily by somebody sending a card to the house or calling in there on the phone. I responded by phone, or put a price on a card. That would probably on the outside take ten minutes or something of that kind. If interested, he would respond with another phone call, and we would have a little exchange back and forth for probably less than five minutes. The time was so small, there—it would be difficult to estimate it.

Q. Now, whose names appear upon the property tax roll?

A. The property tax roll is carried Robert E. Austin and Marian H. Austin at the home address, 500 Poinsettia Avenue in Manhattan Beach. Now, there isn't anything other that carries that address. Each of the authorities in this case calls for your residence, and that's my residence, and while my business is all done at the business. We always use the home address.

Q. Your tax statements are received at your home address?

A. Yes.

(Testimony of Robert E. Austin.)

Q. Is there any other place where your name appears, either your name, or your wife's name, appears as owners of [42] this property we have been talking about?

A. No other place. Just on the assessment rolls and on the deeds of the records in the county here is all.

Q. Did you usually meet the purchasers of these properties you sold to?

A. I very seldom do. I don't recall any deal where anybody ever came to my office or I ever went to anybody else's office in connection with the deals.

Q. Do you ever recall advertising in any newspaper any of this property for sale?

A. No, I never did.

Q. Did you ever advertise in any other way, any other medium?

A. No, I never did advertise any of this for sale.

Q. Did you ever have signs posted on lots, for sale signs? A. No.

Q. Or any other kind of signs?

A. No, I never posted any for sale signs, or in any other way ever advertised the fact that I owned the property or had a control of it.

Q. Have you ever signed any listing agreements in advance, any written listing agreements with real estate brokers?

A. I don't think I ever did. I don't want to be positive about that because sometimes some fellow may have a deal he [43] expected to make and may

(Testimony of Robert E. Austin.)

have presented it to me, some kind of a listing, but I don't remember anything of that kind. I feel sure that I never made one, but I don't want to make that absolutely ironclad.

Q. Have you ever had a real estate broker's license, or real estate salesman's license?

A. No, never had.

Q. Has your wife ever had a license of any kind?

A. No, nothing at all.

Q. Did you ever subdivide any of this property?

A. No, I never subdivided any of these lots. These lots that we have been talking about are scattered lots and they were sold in the same condition that I bought them.

Q. Ever improve any of the lots and sell them as improved?

A. Well, nothing that's involved here. Yes, I have improved some lots. I built a building and rented it for many years. Have built two or three buildings that I have had on hand, and some of them I have now, a couple of them, I have sold, but not until after I had rented them for a considerable period.

Q. You built on those for your own income and investment?

A. Yes, just an investment proposition.

Q. A large number of these lots that have been mentioned today, you still own; is that right? [44]

A. Well, I wouldn't say a large number, no. We have been talking about many 150, or 160 lots; I probably own 15 or 20. My home, for instance, is

(Testimony of Robert E. Austin.)

on a lot comprising seven lots. I have one building that's on another lot comprising four lots; on another lot I have a building comprising three lots. I have got another project there that is about 15 lots in one place, but that isn't anything like enough to say that most of these are still on hand; some of them are.

Q. Is any office of any type or kind maintained at your home?

A. None at all. In fact, I do not maintain an office there. I don't even have my name in the telephone book. Not on account of real estate, but on account of people who need emergency legal service. I try to shut the door when I leave the office, and I don't solicit business at home.

Q. You don't have any cabinets or files or stationery or any other business paraphernalia?

A. No office equipment of any kind, no office or anything else.

Q. Does Mrs. Austin participate in any sales or purchase transactions other than the signing of the necessary documents?

A. Well, probably I ought to answer that no, because as a matter of fact I talk over with my wife, when a sale comes along, I probably tell her about it, but she doesn't have any [45] knowledge of the business in that respect.

The property there is scattered around, and I don't suppose that she knows where it's located.

Mr. Davis: Well, that's all, you may cross examine.

(Testimony of Robert E. Austin.)

Cross Examination

Q. (By Mr. Reardon): Mr. Austin, referring to this schedule in the stipulation, for the purpose of clarifying it for the record, isn't the total of the column labeled "Gross Income" that total is arrived at by adding the income from the rentals, other property income interest, the gross income?

A. Yes, I think the gross income——

Q. The gross income from your law business?

A. Yes, that's what I intended it to be, yes. That's the gross receipts from the law practice, gross receipts from rentals, gross receipts from interest included, and gross profits.

Q. Now, another column there is entitled "Fee Collections" in your law practice? A. Yes.

Q. That doesn't mean a number of individual single clients you had, does it?

A. The total of the column entitled "Gross Law Practice Fee Collections," that's the total amount of fees, cash fees, that I collected during the year. That is,—— [46]

Q. In other words, several from one individual?

A. Yes. That's a number of different payments that came in to constitute that total.

Q. Now, as to all these lots, that we asked about today, you yourself bought all these? In other words, you didn't inherit any of them?

A. No, I didn't inherit any of them.

Q. How long have you lived in Manhattan Beach?

A. Oh, I began to live there in 1929. I was in

(Testimony of Robert E. Austin.)

and around Manhattan Beach, which was sort of a resort area, for 12 years prior to that.

Q. And you lived there consecutively since that time?

A. Yes, I have been there since 1929, always. I have either bought a house or a cabin around there for 12 or 13 years prior to that.

Q. Ever been active in civic affairs?

A. Not until 1932.

Q. It's fair to say you are well known in Manhattan Beach?

A. Well, when I moved there it was about 5000, and it's grown since then. I could probably say I am well known among the officials and business people of the area.

Q. Now, would you mind giving the Court a little of the background of Manhattan Beach? In other words, was this a desirable resort area years ago? [47]

A. Well, it was simply a strip of sand there that somebody thought would be a good place to sell some lots.

Along about 1904 they subdivided about four square miles of the beach and hill land back of the beach.

Q. Who was it that thought it would be a good idea to sell some lots, Robert H. Austin? I am guessing at that part.

A. You see that happened——

Q. And you think it was a good idea to sell lots——

(Testimony of Robert E. Austin.)

Mr. Davis: We object. No proper foundation, and immaterial, going back to 1904 and all that.

Q. (By Mr. Reardon): In 1945, did you think it was a good idea to buy lots in Manhattan Beach?

A. I bought under pressure. I wouldn't have bought them.

Q. Which lots are these?

A. Well, the lots that I bought from the City of Manhattan Beach, that 102 lots we were talking about this morning.

Q. You stated—did you use a broker in several of these transactions?

A. No, I don't think that was my statement. I said that brokers have frequently called me seeking lots for builders, and I made some transactions through a broker. Well, I sold to the brokers like I do anybody else. [48]

A man wants a price on a lot, and he will give him an answer.

Q. And these were brokers?

A. Some of them were brokers; some of them were not. There were some brokers that called me up and some builders who called me direct.

Q. Did it involve paying the broker any commission, either by the purchaser, or eventually the buyer of the lot?

A. Well, I would say, knowing the country, that any broker has got a commission, and I frequently adjusted the price so that the broker could take a commission out of it. That is, he says, "Well, how much do you want for these lots?" If I gave him

(Testimony of Robert E. Austin.)

a price, say of \$1500.00 well, he'd say—I would tell him I would give him \$100.00 on that, and he would say, "Let's make that \$1750.00 on that to take care of me," and deals were made like that sometimes.

Q. In other words, you paid brokers commissions?

A. The broker's commission was taken out of the price the buyer paid for the lot.

Q. When did your real estate activities begin in Manhattan Beach?

A. Why, in 1918, a woman came into the office and needed advice, and she gave me a lot on the beach for the fee.

Q. Now, when these sales were closed, where were they [49] closed?

A. Most of them were closed in an escrow office somewhere. Now, that would be the same as where they sold the builders a large group there, wherever there is a group of lots, that was closest to some escrow somewhere, and the others, like this fellow, who would want to buy, would be able to pay only part down. I would say, "Send me a check for whatever the amount agreed on was," and I sent him a contract there, and they agreed to pay it and——

Q. Who drew up these various papers?

A. I took care of it legal-wise; in connection with all these, I prepared the contracts that I made with people who sold and so on.

Q. Where, at your office?

(Testimony of Robert E. Austin.)

A. That's where I do my legal business, downtown.

Q. Downtown? A. Downtown.

Q. Now, these lots that you purchased from Manhattan Beach, had you seen any of these lots before you bought them?

A. I probably had seen them all, but I hadn't——

Q. In other words, you didn't?

A. I didn't——

Q. You didn't know you were buying lot such and such in an area?

A. I would not buy them sight unseen. [50]

Q. Did you see any of these before you sold them?

A. Oh, yes, I saw them all. I went out and saw every one I had. Somewhere along the line I went out to see what I had.

Q. In other words, it was only after you had acquired them that you were able to say, "This is my Lot 12, Redondo Villa Tract"?

A. Until I got the deeds, I didn't know what lots I had acquired.

Q. Now, none of these lots, excepting the ones on which you subsequently built, and which is income property, the ones we discussed earlier, none of these lots were productive of income?

A. No, they were all vacant when I bought them.

Q. What size were they?

A. There was a great variety of footage on them:

(Testimony of Robert E. Austin.)

some 50 feet wide and some were 40, and a few of them were 25 feet.

Q. Now, normally, in your experience in Manhattan Beach area, are they large enough to build a house on?

A. Well, I built my own house on six lots.

I have a neighbor who has a house built on one 30-foot lot, and another built on a 25-foot lot around the neighborhood. They know how to do it; it's a peculiar type of construction.

Q. Is this area a very desirable residential area at [51] this time?

A. Well, you could get quite an argument about that. Manhattan Beach was incorporated in 1904. Its streets are nearly all dirt streets now: the pavement has only reached a few of our main streets; the street I live on is unpaved.

Q. Since the war, would you say there has been a great amount of real estate development in that area?

A. Oh, yes, a very great amount in Manhattan Beach.

Q. Now, you said that none of these properties were productive of income. Were any of them acquired for the purpose of productive income?

A. Well, they were all acquired for the purpose of getting me off the hook, that guarantee I made the City of Manhattan Beach. Now, after I found myself with that, I began to cast about.

Q. Now, of this group that you acquired as a

(Testimony of Robert E. Austin.)

result of your civic duties to Manhattan Beach, isn't it true you made a profit?

A. Yes, I made a profit, I think, on every lot that I sold.

Q. Now, based upon your familiarity with Manhattan Beach, do you think it's fair to say—it's true to say that any owner of unimproved lots, such as yours, will receive many unsolicited inquiries?

A. Yes, at that time there was just a flood [52] of inquiries coming in.

Real estate brokers would go through the tax rolls——

Q. And you knew this? A. Yes.

Q. Now, over the years, the years in question and prior years, isn't it true that you made many loans from various different banks, real estate loans, I assume, for the purpose of financing——

Mr. Davis: Objected to as immaterial, irrelevant, and incompetent, and not related to the issues.

The Court: Overruled.

The Witness: Well, I borrowed a good deal of money from the banks, but just this minute it would be had to tell you what any particular loan was for.

I made some improvements and found myself short of money, and went to the bank and borrowed money to make up the shortage.

Q. (By Mr. Reardon): Now, several times you mentioned a real estate broker. The real estate broker called a neighbor, and so forth. Was this all the same person, or were these different——

(Testimony of Robert E. Austin.)

A. Well, Mr. Vonfeldt, he was a neighbor, and I think that he was concerned about three matters, one I mentioned to you.

Q. Were these other brokers—had you known them before [53] on these specific transactions?

A. Well, some of them I may have, but a lot of them I didn't. A lot of brokers that I did business with in this matter, people at whose first acquaintance with me was a phone call.

Q. How many of these lots were in this Manhattan Beach area?

A. All of them—except the 125 acres that I bought was in the Manhattan Beach area, but all the other lots—some of them were in Redondo Beach, so we regard that as being one area there; they are so close together.

Q. Now, my question is: You acquired each and every one of these lots with the expectation of making a profit?

A. With the hope of making a profit.

Q. Now, as to the number of lots that you have left out of these transactions, what was the approximate figure, do you recall?

A. Well, I have three lots left out of that 21 that I bought from the Amaranth Land Company, and I had 75 acres, 25, I bought from the Los Angeles Land Company up to six or eight months ago, and I have—well, perhaps I just better tell you how many I have. That will be the easy way. I have about 30 lots altogether.

Q. Left? A. Yes. [54]

(Testimony of Robert E. Austin.)

Q. And seven of them are your home?

A. Yes.

Q. And possibly four are property on which you built income producing?

A. Well, four lots at one place a lease site for one building.

Q. Yes.

A. And that leaves approximately 18 or 19.

Q. Beg your pardon?

A. I say that leaves us with 18 or 19.

I would like to go ahead a little farther with some improvements.

Q. All right.

A. On another perhaps five lots, I built an automobile sales agency that occupies five of them.

I have got three lots on Redondo Beach Boulevard that have some improvements on them.

Buildings on one of the lots and two others are adjacent for the parking site.

Then, I have ten lots that are on Sepulveda Boulevard in Manhattan Beach on which I am expecting to make some improvements in the near future, whenever it's justified.

Q. In other words, you have no unimproved lots left that you were holding for resale?

A. No, I have got several unimproved lots. [54a] I suppose I will hold them for resale unless I happen to have an opportunity to improve them, but as yet, it's yet to be determined.

Q. How many?

A. Well, I have got about—there must be nine

(Testimony of Robert E. Austin.)

or ten anyway, and of course, I'd sell them if I had an opportunity to sell them, just the same as I would sell my home or income property I am collecting some rent on and living on.

Q. Now, on direct examination, you said that you felt that these were good investments?

A. Yes.

Q. What made you think so?

A. Well, people have been coming in increasing numbers for quite a while, and that's been creating quite a demand for real estate. I think vacant real estate would likely increase in price.

Q. Now, relative to the lots you acquired through or as a result of your relationship with Mrs. Hart-ranft, it wasn't clear to me whether you felt you were legally bound to take these lots?

A. No, I wasn't. I didn't think I was legally bound, but I would have been terribly embarrassed——

Q. Had you seen those lots before?

A. No, I bought them before I ever saw them.

Q. Now, as to the lots relating to the fellow who came to you who had a bad heart ailment?

A. Yes.

Q. There were two lots involved there?

A. Yes.

Q. Did you make a profit on those two lots?

A. Yes, I made a profit on those.

Q. And how were they sold, separately?

A. Well, one of them I lost by foreclosure un-

(Testimony of Robert E. Austin.)

der some tax liens and street bonds, so I didn't sell that one, but it turned out that the building boom down there——

Q. In other words, you required to——

A. Yes, I didn't sell them together. I didn't sell one of them. One of them I didn't sell was all.

Q. Relative to the lots that were discussed in relation to Marie Hoskings, who you regarded as your adopted daughter, were there two lots involved there? A. Yes, there were two lots there.

Q. Were they sold separately?

A. They were sold separately, yes.

Q. Now, in and during your civic affairs and duties in Manhattan Beach, as regards these lots, did you do any word of mouth advertising?

A. No, I don't think I ever did.

In that connection, I might say that some of [56] my—well, a good many of my friends knew that I had some lots around there and I may have discussed that with some of them, but I don't recall, except for the first half dozen lots or so that I sold in 1945, I don't recall that I sold to any others that were friendly—close to me in any way.

Q. Now, directing your attention to the taxable year 1953, do you recall what profit, if any, you made off of these similar real estate transactions?

A. Well, I'd have to take a look at this chart we have here to do that.

Q. You say the figure of \$9000.00 was——

A. Well, I don't have those figures before me, and I don't know what 1953 may have been.

(Testimony of Robert E. Austin.)

Q. I show this to you and ask you if you recognize the signature.

A. Yes, that's—that seems to be my signature and my wife's signature on our 1953 return.

Q. Further directing your attention to Schedule D, approximately what profit from real estate transactions does that schedule show?

A. This schedule shows \$4,628.12 for the taxable—amount of income from—

Q. And that is half of the profit?

A. Yes, I think so, yes. It doesn't say so, but I presume that's right. [57]

Q. Further, approximately how many real estate sales does this schedule show?

A. Why, that shows three sales in—it shows four sales in 1953, installment income.

Q. Four sales?

A. Yes, there were some sales made in prior years that on which collections were made in 1953.

Q. Now, directing your attention to this form which purports to be your income tax return for the year 1954, what is the amount shown as a profit from real estate sales?

A. Well, this shows—

Q. Remembering that the figure reported there is half of the profit.

A. Now, this shows \$6113.78, and which the \$2,224.00 is a share of a joint venture project on which I joined some other people.

Q. That's a real estate transaction?

(Testimony of Robert E. Austin.)

A. Yes.

Q. In other words, in the year 1954, you reported over \$16,000.00 profit from real estate transactions?

A. That's right.

Q. Approximately how many transactions are involved there for the year 1954?

A. Five or six—let's see—there's only one sale in 1954, and the profit I got from the joint venture matter [58] there.

Q. Well, one actual sale, but these are incomes——

A. Well, this income is from sales that had been made in years gone by that appear on other lists. That is, one sale, as you are presenting now, might very well appear in ten different schedules.

Q. Now, for the same year, what was your approximate net profit from your legal profession?

A. Well, the net profit from my legal profession, according to this, was \$2825.00; the gross receipts for that, \$7,567.00.

Q. Now, directing your attention to the following year, 1955, using this to refresh your memory, what was it approximately, your net profit off your real estate transactions for 1955?

A. This shows that the 1955 return recorded \$9,911.00 taxable income from sales, and there were four sales made—five sales made in 1955.

Q. In other words, your profit on real estate transactions for 1955 approximates \$19,000.00?

A. Yes, that would seem to be so, from the figures you showed me.

(Testimony of Robert E. Austin.)

Q. And your approximate net profit from your legal profession?

A. Well, that profit for 1955 appears to be [59] \$4,544.00, and the total fees collected were \$9,900.00.

Mr. Reardon: The respondent rests, your Honor.

Redirect Examination

Q. (By Mr. Davis): This income that you have just related for the years 1953, 1954, and 1955 relate to not only sales but prior sales during—sales during prior years?

A. That's right. Some of the sales were during prior years, but some sales were for this year or for that year. You see, when a city grows from a population of 5000 to 35,000, it—real estate prices—many of these were made on the installment basis.

Q. Many of these were made on the installment basis?

A. Some of them were made on installment, yes, sir.

Q. Now, when escrow companies handled your transactions, did they draw up the papers?

A. Usually, they did.

Q. Has there been a sewer problem in the area of Manhattan Beach during the years in question that has affected values in the property?

A. Well, they are building a lot of sewers in Manhattan Beach during the last five or six years.

Q. I mean sewers into the ocean.

A. Well, that has some effect on it and in two or three ways. [60]

(Testimony of Robert E. Austin.)

Q. In spite of that, there's been quite an increase in population?

A. During part of the time that has been discussed here.

Q. Has swimming been prohibited on account of the polluted beaches?

A. Yes, there's been — the Health Department has quarantined the beaches on account of the Los Angeles sewage in that area. There's quite a little bit of controversy going on over that now.

Q. Were you aware of this at the time you entered into these transactions?

A. Well, when I first started, I wasn't aware of it. As a matter of fact, I didn't become aware of the fact that the beaches were quarantined until quite a while after this matter had been going on. I think probably 1950 is when the quarantine first went into effect there. Some of these transactions we have been talking about occurred in 1945, 1946, 1948 and 1949.

Q. Now, in addition to this property acquired in the Manhattan Beach area, and the two parcels in the City of Los Angeles, there is also certain property, at least one transaction involving San Bernardino County and Riverside?

A. Yes, but that was a total loss; I never did get anything out of that property.

I took that in for fees, and let the Tax Collector [61] take it over later on.

Mr. Davis: Well, that's all.

Mr. Reardon: Respondent rests, your Honor.

Mr. Davis: We rest.

The Court: Petitioner's brief will be due in 45 days; Respondent's 30 days thereafter, and the Petitioner may reply in 20 days?

Mr. Davis: Very well.

(Whereupon, at 3:00 o'clock, p.m., Monday, April 22, 1957, the hearing in the above-entitled matter was closed.) [62]

[Endorsed]: Filed May 10, 1957.

[Endorsed]: No. 16097. United States Court of Appeals for the Ninth Circuit. Robert E. Austin and Marian H. Austin, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: July 15, 1958.

Docketed: July 18, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16097

ROBERT E. AUSTIN and MARIAN H.
AUSTIN, Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

STATEMENT OF POINTS ON WHICH
APPELLANTS RELY

To the Clerk of the United States Court of Appeals,
Ninth Circuit:

The Petitioners on Review in the above entitled matter rely upon the proposition that the testimony and evidence in the above entitled case do not support the finding of the Court below to the effect that "The lots sold by petitioners were held by them primarily for sale to customers in the ordinary course of trade or business."

Dated: July 21st, 1958.

/s/ ROBERT E. AUSTIN,
/s/ WENDELL H. DAVIS,
Attorneys for Petitioners on
Review.

[Endorsed]: Filed July 22, 1958. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD WHICH IS
MATERIAL TO BE CONSIDERED ON
APPEAL

The Petitioners on Review designate the:
Petition,
Answer,
Stipulation of Facts,
Reporter's Transcript as corrected by order of
Court,
Memorandum Findings of Fact and Opinion,
Decision, and
Petition for Review

as being all of the record which is material to the
consideration of the appeal herein.

Dated: July 21st, 1958.

/s/ ROBERT E. AUSTIN,
/s/ WENDELL H. DAVIS,
Attorneys for Petitioners on
Review.

[Endorsed]: Filed July 22, 1958. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION FOR CONSIDERATION OF
EXHIBITS WITHOUT REPRODUCTION

It is stipulated between counsel for the respective parties that the exhibits heretofore transmitted to the Court in their original form by the Clerk of the Tax Court of the United States may be considered by the above entitled Court in their original form without reproduction.

Dated this 29th day of July, 1958.

/s/ ROBERT E. AUSTIN,

/s/ WENDELL H. DAVIS,

Attorneys for Petitioners on
Review.

/s/ CHARLES K. RICE,

Assistant Attorney General, Attorney for Respond-
ent on Review.

[Endorsed]: Filed July 30, 1958. Paul P.
O'Brien, Clerk.



No. 16097

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT E. AUSTIN and MARIAN H. AUSTIN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' BRIEF ON APPEAL.

ROBERT E. AUSTIN, and

WENDELL H. DAVIS,

215 West Seventh Street,
Los Angeles 14, California,

Attorneys for Petitioners.

FILED

OCT 27 1958

PAUL P. O'BRIEN, CLERK

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No. 16097

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

ROBERT E. AUSTIN and MARIAN H. AUSTIN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' BRIEF ON APPEAL.

Jurisdiction and Venue.

This is an appeal from a decision of the Tax Court of the United States deciding that there are deficiencies in petitioners' income tax for the years 1950, 1951 and 1952. The Tax Court had jurisdiction to determine whether there were deficiencies after the Collector of Internal Revenue had made deficiency assessments. (26 U. S. C. A. 1100, 1101.)

The Courts of Appeal have jurisdiction to review proceedings of the Tax Court of the United States. (28 United States Code, Sec. 2074; Rules of Court of Appeals, Ninth Circuit, Rule 29.)

Venue in this matter is with the Court of Appeals for the Ninth Circuit since petitioners are and were during

the years in question residents of Manhattan Beach, California. They filed income tax returns with the office of the Collector at Los Angeles, California. The alleged deficiencies were assessed from the Los Angeles office. The trial before the Tax Court was had in Los Angeles.

Specification of Error.

The court erred in making its finding that [Tr. p. 26] “the lots sold by petitioners were held by them primarily for sale to customers in the ordinary course of trade or business” in that said finding is contrary to the evidence.

Statement of the Case.

This case involves an alleged deficiency in income tax returns for the years 1950, 1951 and 1952.

The question presented is whether certain vacant lots, which were acquired by petitioners over a period of years, and which were sold during the years in question, were held by petitioners primarily for sale to customers in the ordinary course of their trade or business so as to be excluded from the term “capital assets” as defined by Section 117(a)(1), (j)(1) of the Internal Revenue Code of 1939.

Petitioners acquired certain vacant real estate through various fortuitous circumstances over a period of years and sold some of it during the years in question. Petitioners always deemed such acquisition and sale as the acquisition and sale of investments. The Commissioner of Internal Revenue and the Tax Court regard petitioners as having been in the real estate business. The difference,

of course, is a difference in taxes as applied to capital assets and ordinary income.

We accept most of the findings of fact of the Tax Court. We do not accept the finding which is really a conclusion of law that the lots sold were held primarily for sale to customers in the ordinary course of trade or business.

The Tax Court found the following facts pursuant to stipulation [Tr. pp. 17, 13, 16]:

Stipulation of Facts.

"It is stipulated that the following facts may be received in evidence without further proof; provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts stipulated; and provided, further, that both parties to this stipulation reserve the right to object to the materiality and relevancy of any of the facts herein stipulated.

1. The petitioners are individuals; are husband and wife, and reside at 500 Poinsettia Avenue, Manhattan Beach, California. The income tax returns for the period here involved, 1950, 1951 and 1952, were filed with the Collector, now Director, for the Los Angeles District of California. Photostatic copies of the returns are attached as joint exhibits 1-A, 2-B, 3-C and 4-D.

2. Petitioner, Robert E. Austin is a lawyer engaged in the private practice of law, and has been so engaged for the past forty years, having his law office in down town Los Angeles.

3. Petitioner, Marian H. Austin, at all times mentioned in this proceeding has been a housewife.

4. All lots and sales involved were in the Manhattan Beach area, except one.

5. The real estate purchases and sales by petitioner for the years 1943 to 1952, inclusive, are as follows:

<u>Year</u>	<u>Purchases</u>	<u>Number of Lots</u>	<u>Sales</u>	<u>Number of Lots</u>
	<u>Number of Transactions</u>		<u>Number of Transactions</u>	
1943	2	2	0	0
1944	2	5	0	0
1945	3	69½	0	0
1946	6	64½	24	38
1947	6	16	8	13
1948	3	9	22	26
1949	1	1	7	15
1950	1	1	5	11
1951	....	....	8	23
1952	....	....	10	14

During the years 1950, 1951 and 1952 petitioners received profits from twelve sales of prior years that were made on installment terms.

6. Petitioners' income from all sources for the years 1943 to 1952, inclusive, was as follows:

GROSS INCOME 1943 TO 1952, INCLUSIVE, OF PETITIONERS
ROBERT E. AUSTIN AND MARIAN H. AUSTIN

<u>Rent</u>	<u>Income from Interest</u>	<u>Number of Law Practice Fee Collections</u>	<u>Gross Amount Law Practice Fee Collections</u>	<u>Net Profit On Real Estate Sales</u>	<u>Gross Income</u>	<u>Net Collections From Law Practice</u>
1,890.00	195.00	101	3,849.10	.....	5,934.10	1,832.93
1,140.00	.....	106	6,628.23	678.00	8,446.23	4,434.48
.....	.....	122	9,081.18	210.32	9,291.50	5,444.90
.....	.....	89	5,345.00	17,655.71	23,000.71	1,756.62
7,596.00	390.00	77	7,649.15	12,357.70	27,992.85	3,502.89
10,762.79	288.40	76	5,977.40	6,737.12	23,765.71	2,166.40
5,838.50	696.38	83	6,079.19	6,029.72	18,643.79	1,476.43
5,456.00	522.51	91	5,232.67	7,782.56	37,637.53	1,162.91
6,820.94	897.72	140	9,360.80	10,476.79	27,556.25	4,851.60
7,125.00	2,144.07	117	6,156.68	9,308.59	24,734.34	1,279.08

7. The taxpayers for many years have been residents of the City of Manhattan Beach. Mr. Austin has been active in local affairs there for many years. He served as School Trustee, helped organize the local water district, participating in many elections relating thereto, and has been a member of the Directors of the water district, and is presently the representative of that district on the Board of the Metropolitan Water District of Southern California.

8. The telephone at home is and always has been listed in Mrs. Austin's name. It is 'Austin, Marian H., 500 Poinsettia Ave., Manhattan Beach.' Mr. Austin's name has never been listed in the Manhattan Beach telephone directory.

9. Manhattan Beach is approximately 19 miles from downtown Los Angeles.

10. If it is determined that either or both are in the real estate business then the Commissioner has properly determined the self-employment tax as shown in the statutory notice of deficiency."

(signed by both parties).

The Tax Court further found as follows:

That petitioners are husband and wife; that Marian H. Austin is a housewife, and had little connection with the Transactions.

That petitioner, Robert E. Austin, "has practiced law since 1912, and at all times here relevant had his law office in downtown Los Angeles, approximately nineteen miles from Manhattan Beach" where all lots involved were except one.

"One hundred and two of the lots acquired during 1945 and 1946 were sold to petitioners by the City of Manhattan Beach. The sales arose from the fol-

lowing circumstances: Certain property, located in Manhattan Beach (sometimes hereinafter referred to as the city), was owned by the State of California and was not on the city's tax rolls. In order to list the property on the city's tax rolls it had to be privately owned, and the officials of the city were desirous of bringing about this result. Accordingly, a plan was devised whereby the city could acquire the property and then sell it to private parties. This plan entailed expenditures in amounts greater than the officials of the city were prepared to undertake. To aid in carrying out the plan petitioner, Robert E. Austin, and three others agreed to pay the city any loss it might suffer as a result of this plan. In accordance with this agreement" petitioners "purchased 102 lots which the city had acquired from the State and which it was unable to dispose of at public auction." [Tr. pp. 19-20.]

"Petitioners purchased nine lots from the Pacific Land and Title Company in 1945. These purchases were connected with" petitioners' "membership in the Manhattan Beach Property Owners Association and that Association's interest in acquiring a park." [Tr. p. 20.]

"Two of the lots acquired by petitioners in 1946 were located across the street from where they then resided, and were purchased to protect the character of the neighborhood.

"Petitioners acquired 21 lots in 1946 from The Amaranth Land Company. These acquisitions came about in the following manner: A client of 'petitioner' was involved in a joint venture concerning real property. At the death of the client petitioner was retained by decedent's family to represent them in the disposition of the joint venture's property.

In the course of winding up the joint venture, and while acting on behalf of the family, 'petitioner' entered the highest bid for the property. The family was interested in improving its cash position, and was disappointed in 'petitioner's' actions on their behalf. Petitioner 'paid the amount bid to the joint venture and the property was sold to him.'

" 'Petitioners purchased one lot in 1946 and four in 1947.' These acquisitions were to be used in conjunction with property already owned by them. In 1947 petitioners acquired 2 lots in payment for legal services.

"Two additional lots were acquired in 1947 under the following circumstances: On one occasion in 1947 a client, Mr. Clendennin, came to 'petitioner's' office and discussed with him problems concerning certain lots owned by the client's daughter. Clendennin thought that his daughter would eventually lose money on these lots. He returned about one week later, told 'petitioner' that he had been advised that he (the client) did not have long to live, and asked 'petitioner' to purchase the daughter's property. 'Petitioners' purchased two lots from the daughter. Shortly thereafter the client died." [Tr. pp. 21-22.] Taxpayer thought the lots were encumbered for all they were worth, and permitted one of them to be sold for taxes and bond, and abandoned the other, but later somebody made an offer sufficient to pay off the delinquent taxes and bond and left a small profit. [Tr. p. 65.]

"Petitioners purchased one lot in 1950 from a neighbor who was unable to pay a debt to petitioner. They paid for the lot, in part, by cancelling the indebtedness." [Tr. p. 22.]

“Petitioners did not advertise in connection with their real property, nor did they post any ‘for sale’ signs. They did not list their property with real estate brokers, and neither of them was a licensed real estate broker. They did not maintain an office in their home, and their home telephone number was listed under the name of Marian H. Austin.

“Sales were initiated by prospective customers contacting petitioners through the mails or over the telephone. Negotiations were conducted in the same manner, and petitioners often did not come into personal contact with purchasers. On some occasions sales were initiated by brokers. On these occasions the brokers were acting for third parties.

“Whenever necessary ‘petitioner’ would prepare legal documents in connection with a sale in his law office. Prospective customers never came to his law office. Most of the sales involved were closed in escrow offices, not at petitioners’ home.”

All income tax returns in evidence—the earliest 1950—show that petitioner, Robert E. Austin, was more than 65 years of age; he had practiced law for 45 years. [Tr. p. 39.]

Real estate acquisitions and sales took an infinitesimal amount of time as compared to petitioner’s law practice. [Tr. p. 71.] He very seldom met the purchasers. [Tr. p. 72.] Did not subdivide or improve any of the lots involved here. [Tr. p. 73.]

ARGUMENT.

The sole question here is—Was the evidence before the Court below sufficient to sustain the finding that the Real Property sold by petitioners in 1950, 1951 and 1952 was *held by them primarily for sale to customers in the ordinary course of their trade or business?* The Court thought the evidence was. We think that it was not; hence this appeal.

41 of the 48 lots sold in those 3 years, 1950, 1951 and 1952, were acquired in 1945-1946, four to seven years prior to the sales. [Tr. p. 23.] The other seven—one was purchased in 1943—seven years before its sale. 2 were purchased in 1944, eight years before they were sold. 1 was purchased in 1947, five years before it was sold. 2 in 1948, three years before they were sold. 1 in 1949, three years before it was sold. [Tr. p. 23.] Only 1 lot was acquired by taxpayers in the period under consideration (1950, 1951 and 1952), [Tr. p. 19] and that was taken in settlement of a debt [Tr. p. 22], and sold years later. Only 1 was acquired in 1949. That was to provide for parking and sewage disposal for other property owned by taxpayers. [Tr. p. 22.] Of the 9 lots acquired in three purchases in 1948, 4 were in purchase of a home [Tr. p. 22], and 2 were to provide parking for other lots owned by taxpayer.

The question whether the lots were held by taxpayers primarily for sale to customers in the ordinary course of their trade or business is a question of fact to be determined by the court. But there must be some substantial evidence to sustain such a finding. The mere fact that taxpayer has made sales and realized profits certainly is insufficient to sustain a finding that the sales were made to customers in the ordinary course of *taxpayers' busi-*

ness. The statute expressly provides that the owner of property may sell it at a profit and be entitled to have it considered a capital asset, and the profits taxed on that basis, if the sales are not made to customers in the *ordinary course of taxpayers' business*. The cases seem to agree that some activity must be present besides the mere ownership of property and willingness and opportunity to sell. We think there was no other element in the present case.

The cases say that the Court may look the general situation over for factors indicating that the seller is in business or promoting sales, or that he has or seeks customers. This Court in a well-considered opinion in the case of *Pool v. Commissioner* (9th Cir.), 251 F. 2d 233, sets forth five factors which may be considered in determining if sales are to *customers* and in the *ordinary course of sellers trade or business*. They are:

1. Nature of acquisition of the property;
2. Frequency and continuity of sales;
3. Nature and extent of taxpayer's business;
4. Activity of seller about the property; and
5. Extent and substantiality of the transactions.

We think that each of these factors demonstrate in our case that the taxpayers' lots were not held primarily for sale to customers . . . they were just held . . . because there was nothing else taxpayers could do with them; that taxpayers had no customers . . . and didn't seek any; that taxpayers were not in the trade or business of selling lots; that purchasers of their lots were in no sense customers. We will discuss the factors set out in the *Pool* case as we think they apply to our case, as follows:

Nature of Acquisition of the Property.

The finding of facts of the court below shows that 168 lots were acquired in ten years beginning in 1943 and ending with 1952. Only 1 was acquired in the period under consideration here, but it was not sold in that period. 132 of these were acquired in 1945-1946 in three transactions. In one transaction 102 lots were acquired from the City of Manhattan Beach because taxpayer and others had guaranteed the City it could sell them. [Tr. pp. 19-20.] The City tried and held unsuccessful auction sales, and called on the guarantors to make good their guarantee. Taxpayers share was 102 lots. This deal originated in 1944. It was finalized in 1945 and lots were delivered in 1945 and 1946.

In another 21 lots were acquired for \$2,400.00 (\$114.29 each) through a misunderstanding with a client for whom taxpayer had taken them at that price in settlement of some of her business. This transaction occurred in March, 1946. [Tr. pp. 20-21.]

In the third, taxpayer acquired 9 lots for \$575.00 (\$63.89 each) to help get land desired for a City Park. This transaction occurred in March, 1945. [Tr. pp. 53-54.]

Certainly nothing in any of these three purchases could indicate that taxpayer was buying lots for sale to customers. These three purchases account for 132 of the 168 lots acquired by taxpayer in the ten year period presented by the Commissioner to sustain the theory that taxpayer was in business of buying and selling real estate. Only 27 lots (11 transactions) occurred in the six years after the 1945-1946 acquisition. In the last four years of that period only two transactions occurred

each for one lot and in different years. Only 1 lot was acquired in 1949. [Tr. p. 22.] It was purchased for the purpose of furnishing parking and sewage disposal area to an adjoining property owned by taxpayers. In 1950 only 1 lot was acquired. [Tr. p. 22.] That was taken in payment of a debt. No property was acquired in either 1951 or 1952.

The 36 lots acquired in the ten year period besides the 132 acquired in the three transactions in 1945-1946, were acquired in 15 transactions in six different years. They were as follows:

1 lot in 1943 at a tax sale in which taxpayer without expectation of buying placed 30 or 40 lots on the tax collector's sales list and appeared under agreement to make opening bid on each. [Tr. p. 19.] One lot was struck off to taxpayer who owned it until 1950, seven years later.

1 lot bought at same tax sale for \$29.00 for a friend who had used all his cash. The lot was later left on taxpayer's hands and abandoned.

14 lots for homes:

6 lots on which taxpayers are now living [Tr. p. 21];

4 lots for home bought and used in 1948 [Tr. p. 22];

4 lots across street from home in which taxpayers were living prior to 1948, to protect it from use as a stockyard or other obnoxious purpose;

6 lots bought because they were adjacent to lots already owned by taxpayers and were needed for parking and sewage disposal [Tr. pp. 21-22];

3 lots in Riverside and San Bernardino Counties, more than 100 miles from other lots acquired by taxpayer taken as fees and lost for nonpayment of taxes [Tr. p. 19];

2 lots near Sunland, many miles from other property owned by taxpayers, and of different character, taken partly in payment of fee for legal services, and held several years [Tr. p. 21];

2 lots taken from a friend in distress, one of which was abandoned [Tr. p. 22];

2 lots from a business associate in settlement of an account [Tr. p. 20];

2 lots were returned by a young friend for whom taxpayers bought them to help him [Tr. p. 27];

2 lots for investment, and still owned by taxpayers [Tr. p. 22];

1 lot taken for debt [Tr. p. 22];

None of these purchases were made under conditions that would support a presumption or assumption that taxpayers were in real estate business, or was buying for sale to customers. None of the 132 lots were salable at the time taxpayers purchased them, and only 27 lots of the 168 were bought after the war when it began to appear that lots in that area might be salable.

The 102 lots were part of a large number of lots that had been deeded to the State of California for failure of the owners to pay taxes on them [Tr. p. 20]. The City had attempted to sell them at auction. There were no bidders. None of this property was salable till after the war ended, and no one knew that it would then be in demand. It was not in demand at the end of the first world war and had remained idle and useless till after the end of the second world war. The 21 lots were the residue of property owned by The Amaranth Land Co. One of its promoters was dead and the others approved a sale of these lots at \$114.29 each. There could have been no mar-

ket known to them or they would not have approved this sale. The sale of the nine lots by the Pacific Land and Title Co. at \$63.89 each is more proof that there was no market for any of this property. The acquisition of such property by taxpayer, a lawyer then more than sixty years old with no experience in real estate business, was to say the least improvident. Nowhere does a purpose to go into business, or acquire property for sale to customers appear.

Frequency and Continuity of Sales.

When taxpayers found themselves with 132 lots on hand which they didn't know what to do with in 1946, their position was certainly that of an investor, not a dealer. When in 1947 and 1948 they acquired 25 lots more, as described above (ten lots for homes, some for fees and others for miscellaneous reasons), this gave them 157 lots. They made no effort to sell, but sold only when buyers sought them out and offered satisfactory prices. In such a situation with no sales effort it would take quite a while—in this case years—for enough buyers to find the owners of the lots to buy even the 140 lots the record shows were sold in the ten year period presented here, 1943 to 1952, inclusive. The dribbling along of the sales over that period shows the taxpayers to have been investors selling their investments if and when some enterprising buyer sought them out and offered a satisfactory price. The way these sales came about and the lack of promotion and other activity negatives the theory that taxpayers were in the business of selling lots, or that they had or sought customers.

In *Phipps v. Commissioner of Internal Revenue* (2d Cir.), 52 F. 2d 469, 471, the taxpayers had bought tracts

2 lots near Sunland, many miles from other property owned by taxpayers, and of different character, taken partly in payment of fee for legal services, and held several years [Tr. p. 21];

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In *Phipps v. Commissioner of Internal Revenue* (2d Cir.), 52 F. 2d 469, 471, the taxpayers had bought tracts

of Florida real estate. After buying the tracts the taxpayers "bought very little." The court in holding that the taxpayers were not in business said:

"The real estate transactions of the taxpayers during 1924 and 1925 apparently consisted only in selling the remainder of the Palm Beach tract which had then been held for seven or eight years and in holding a few other lots for opportune offers. No purchases during these years are shown. . . .

"Persons with large incomes of course invest their surplus funds in something, and if, to diversify their holdings, they buy land, with the expectation of selling it when a good price is offered, such an expectation cannot, in our opinion, convert some sales of land that had been held for seven or eight years into a trade or business in real estate. There should be a greater continuity and larger absorption of time in such transactions to make the taxpayers more than investors. A fair reading of the record makes it clear that nothing was done during the years in question but to hold land for sale which had been previously purchased, and to accept such offers from purchasers as were presented by brokers and seemed satisfactory. . . . They had not continuously engaged in the development and sale, or the purchase and sale of lands. . . ."

No sale in and of itself was doing business, nor did it make selling the ordinary course of trade or business of the taxpayer; nor would 84 such sales in seven years—one a month—do so. Nor was the buyer at such a sale taxpayer's customer. Taxpayer had no part in creating the demand in people's minds for this property. Certainly the development of such a demand in the public's mind cannot constitute doing business on the part of taxpayer.

Nor did people who wanted lots thereby become taxpayers' customers. The fact that in such a market the sales dribbled along over seven years without selling all of the lots is evidence that there was no activity tending to produce sales or creating a condition in which taxpayers could be said to be in business of dealing in real estate. Certainly activity on the part of people who wanted to buy does not change taxpayers from investors into dealers.

Likewise the important thing is not whether sales were made, but whether they were made while doing a business. The fact that somebody took property off the hands of the owner thereof does not prove anything.

The size of the profit resulting from a given sale or many sales would not change the character of the transaction. The sale of these 140 lots, 84 sales in seven years, acquired as they were with no replenishment, certainly negatives the idea of selling in the regular course of business to customers. The person who is in business buys as well as sells.

Nature and Extent of Taxpayer's Business.

Taxpayer, Marian H. Austin, was at all times a housewife, and had nothing to do with acquiring or selling the property in question here. Taxpayer, Robert E. Austin, began practicing law in Los Angeles in 1912, and (when the case was tried in the court below) in 1957, forty-five years later, he was still there in his office part of every business day, and had been through all the intervening years. Taxpayer has always been a lawyer and has practiced law on Spring Street in Los Angeles at all times since 1912. In the ten years presented by the Commissioner here taxpayer collected one thousand two fees, about two a week. [Tr. p. 24.] They averaged about

\$65.00. A lawyer who maintains such a practice running along at about one hundred fees a year of that size would have to be devoting most of his time to that business. In his brief in the court below respondent's counsel suggested that this "practice could not have been very active." Most people are poor people and the clients of most lawyers are in this class, and the lawyer who serves them necessarily does a lot of work and collects rather small fees. In any event the one hundred or so fees collected by taxpayer in 1950 represented probably a thousand times as much work and thought as the five sales made by him in that year, and the same holds true for each and every other year.

Activity of Seller About the Property.

Taxpayer acquired a lot in Manhattan Beach in 1919 which he continued to own and use as a site for a beach cabin and then his home for many years. The next real estate contact shown by the record was in 1943 when he with others, for the purpose of getting lots back on the tax roll of the city for benefit of the city caused the County Tax Collector to put on sale a substantial number of beach lots then owned by the State of California acquired for nonpayment of taxes. As shown by the evidence the Tax Collector would not then list a lot for sale unless the person requesting it to be offered agreed to appear and bid. Taxpayer, with others, requested many lots to be put on the list for sale and each of the parties making the request promised to appear at the sale and make a bid. [Tr. pp. 19-20.] Pursuant to that arrangement taxpayer caused thirty or forty lots to be put on the list for sale and appeared at the sale and offered bids on each lot. All but one of them were taken by other bidders. Taxpayer, at that sale in 1943, acquired title to one lot which he sold

in 1950, seven years after purchase. At the same sale he bid in a lot for a friend which five years later was sold by the Tax Collector again for nonpayment of taxes. The next real estate transaction was in 1944 when a client deeded three lots in Riverside and San Bernardino Counties to taxpayer in payment of fees. These lots were abandoned and later sold by the Tax Collector for delinquent taxes and lost to taxpayer. The same year, 1944, taxpayer purchased two lots across the street from his home, which the record shows he sold in 1952, eight years later after sale or abandonment of that home. Later taxpayers purchased two other lots for the same purpose. They were also sold after sale or abandonment of that home.

Then comes the year 1945-1946 in which taxpayer purchased the 132 lots above discussed.

Lawyers as a class are reputed to be careless investors and are generally known as "easy marks." The purchase of the lots in 1945-1946 by a lawyer then sixty years old who had been diligently practicing law in Los Angeles for 38 years without any previous experience with real estate, would seem to be a prize example of this inaptitude. The property purchased was in an area apparently dead so far as real estate values and real estate activities was concerned. The lots concerned were in an area where very large portions of the property had been sold to the State for nonpayment of taxes. Experienced real estate operators such as the Pacific Land and Title Company and The Amaranth Land Co. were getting out. The purchases and the way they were made show a complete lack of purpose to engage in the real estate business in taxpayer.

The profit made by taxpayers on the real estate under consideration here was due to an unexpected boom with

which he had nothing to do. This turned what in the ordinary course of events would have been a nightmare into a fairy tale. The property he had acquired did not profit from an afterwar boom at the end of the first world war. It continued to be so undesirable that a large part of it had been sold through the years to the State of California for nonpayment of taxes. The purchase of the 132 lots was not part of any smart plan. Taxpayer inadvertently stumbled into it.

After the war ended and people began to get back to civilian activities inquiries began to come from people who wanted to buy lots. Nearly all were by letter or telephone. These phone calls cannot have represented more than ten or fifteen minutes of taxpayer's time on any sale and the time used at the office in filling out blanks (deeds—notes—deeds of trust or contracts of sale) for any transaction would not be very much more than filling out a blank check or two. Blank deeds, notes, deeds of trust and contracts of sale are distributed without cost by banks, trust companies and escrow agencies, and are generally used in such transactions. So the charge by the Tax Court Judge that the legal work involved was important [Tr. p. 28] has no foundation. Taxpayers contributed nothing substantial in time, effort or planning to these sales, and certainly had *no customers nor business involving sale of real estate*.

In fact the court below in its findings determines that there was no activity which could be construed as amounting to a business.

It found [Tr. pp. 25, 26] that

“Petitioners did not advertise” nor “did they post any ‘for sale’ signs.” “They did not list their property with real estate brokers, and neither of them was

a licensed real estate broker. They did not maintain an office in their home, and their home telephone number was listed under the name of Marian H. Austin" (the wife).

"Sales were initiated by prospective customers contacting petitioners through the mails or over the telephone. Negotiations were conducted in the same manner, and petitioners often did not come into personal contact with purchasers. On some occasions sales were initiated by brokers. On these occasions the brokers were acting for third parties." "Prospective customers never came to his law office. Most of the sales involved were closed in escrow offices, not at petitioners' home."

"There has been a large amount of real estate development in Manhattan Beach since 1945. People interested in purchasing property in Manhattan Beach went through the tax rolls to learn the names of property owners. Owners of property received numerous unsolicited inquiries concerning their property. Petitioners were aware of this situation."

These findings seem to eliminate all possible activity that might constitute doing business.

The only finding of activity is: "Whenever necessary Robert would prepare legal documents in connection with a sale in his law office."

There is also in the findings by the court below the statement: "Petitioners sometimes borrowed money from banks to help finance real property purchases." [Tr. p. 26.] This probably is not material to the issue but even it is not supported by the evidence. The only testimony

on this subject came in cross-examination of taxpayer [Tr. p. 81] and is as follows:

“Q. Now, over the years, the years in question and prior years, isn't it true that you made many loans from various different banks, real estate loans, I assume, for the purpose of financing— . . .

The Witness: Well, I borrowed a good deal of money from the banks, but just this minute it would be hard to tell you what any particular loan was for.

I made some improvements and found myself short of money, and went to the bank and borrowed money to make up the shortage.”

We do not think this testimony supports the idea of borrowing to finance the purchasing of real property. The testimony shows that 132 lots of the 184 purchased during the period under consideration were acquired for small amounts. Nine for \$575.00; 21 for \$2,400.00; 102 for the cost paid out by the City for acquiring the tax deeded lots. The tax returns in evidence for the years 1950, 1951 and 1952 each show that the improvements on real property from which rent was collected were valued at \$37,500.00. This would seem to be under the circumstances more likely to be the occasion for bank loans than the purchase of lots mentioned herein.

Extent and Substantiality of the Transactions.

As it turned out the profits on the five sales in 1950 amounted to \$7,782.56; that is, \$1,556.61 for each sale. This compared to the \$57.50 fee taxpayer collected from each client served in 1950 shows that the investments were paying off, but they were nevertheless investments and the sales were certainly the sales of assets improvidently acquired and the profits do not indicate any activity on the

part of taxpayer. There was no replenishment of stock. Taxpayers consider themselves investors in this situation, though the thought never occurred to them until since the discussion of income tax brought it up. They did nothing to produce sales or to bring in customers. The court below points out taxpayers did not advertise or publicize their properties because it wasn't needed—they spent very little time on sales but they spent enough. If they did nothing to carry on the business of selling real estate and spent little or no time in it how can they be charged with *selling to their customers* or of selling in the *regular course of their business*. The activity shown does not amount to a business. The matter of selling property and making a profit is not enough to defeat taxpayer's claim for capital gains treatment. If it were so the statute would be idle. It gives the taxpayer in such cases as this the right to capital gains treatment unless (1) *the property was held by the taxpayer primarily for sale to customers*, and (2) *it was sold in the ordinary course of his (the taxpayers) trade or business*. Business mentioned in the statute means "busyness." It implies that one is kept more or less busy; that the activity is an occupation. (*Snell v. Commissioner* (5 Cir.), 97 F. 2d 891.) All investors sell their property when a buyer offers a satisfactory price.

We submit that there is no evidence that selling real estate was taxpayers *trade* or his *business*, or that taxpayer had or expected to have or did anything to acquire customers.

We think the court below erred by considering the profits accruing as evidence of activity in the face of positive evidence and the court's own finding that there was no activity. Mere profits are not evidence of activity.

In *Taylor v. Commissioner of Internal Revenue* (2 Cir.), 76 F. 2d 904, the Court of Appeals held that the mere amount and value of shares of stock in which the taxpayer dealt, did not make him a “trader,” or his transactions in corporate securities a “business.”

That case too involved a lawyer. He gave practically all of his time to his profession. However, at the end of 1925 he had on hand 4,500 shares of certain stock, 2,533 shares of which were purchased in August of that year. He purchased 800 more shares in January, 1926; 600 shares in January, 1927; 400 shares in February, 1927; 1,800 in April, 1927; 200 in June, 1927; 1,000 in September, 1927. In 1929 he reported a net gain of \$490,000.00 from the sale of 14,000 shares.

It appeared that he gave very little time to the purchase and sale of stock and held most of the shares for more than two years. The court held the stock to be capital assets. The court said

“the mere amount and value of the shares of Public Service Corporation, or other stock in which the taxpayer dealt, did not, in our opinion make him a ‘trader,’ or his transactions in corporate securities a ‘business’ in the purchase of stocks held ‘primarily for sale.’ It seems plain that the shares in question were not ‘primarily held for sale in the course of . . . trade of business. . . .’”

In *Delsing v. United States* (5th Cir.), 186 F. 2d, it was an admitted fact that the taxpayer’s sales activities constituted his major activity, and from this the trial court found that any sale of real estate by him was in the ordi-

nary course of his business. The Court of Appeals in reversing the judgment stated that "the disparity between income from sales and from rentals was not controlling and that there was no basis for a determination that the sales of the originally constructed defense rental housing units constituted a disposition of "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business" so as to render the profit taxable as ordinary income."

In the instant case the size of the profit had no relation to appellant Robert E. Austin's time or effort. The matter of profit should not determine whether or not he was in business. To hold otherwise would mean that a person who lost money could never be in business. Appellants had nothing to do with creating the market for their property. The boom came and fortunately they made some money on what were purely investments.

Not a single act or fact in the record shows any activity. The court dismisses all of the evidence that there was no activity—no advertising—no improvements—no time spent on the sales on the ground that one might carry on a business in the absence of either of them. But nowhere is it pointed out what was done that constitutes doing business. The cases cited in the opinion each points out that absence of one or another of activities usually present in business does not defeat the idea that taxpayer was actually engaged in business, but in each case some affirmative facts are presented to show that taxpayer was in business. In our case the lack of advertising, of seeking cus-

tomers, and other activities is pointed out, but nowhere is it pointed out that there was any activity of any kind constituting doing business.

Taxpayer “could have maintained a more passive role only by refusing to sell at all. (*Frieda E. J. Farley*, 7 T. C. 198 (1946).)

We respectfully submit that the judgment of the court below should be reversed.

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WENDELL H. DAVIS,

Attorneys for Petitioners.

**In the United States Court of Appeals
for the Ninth Circuit**

**ROBERT E. AUSTIN and MARIAN H. AUSTIN,
PETITIONERS**

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision of the
Tax Court of the United States**

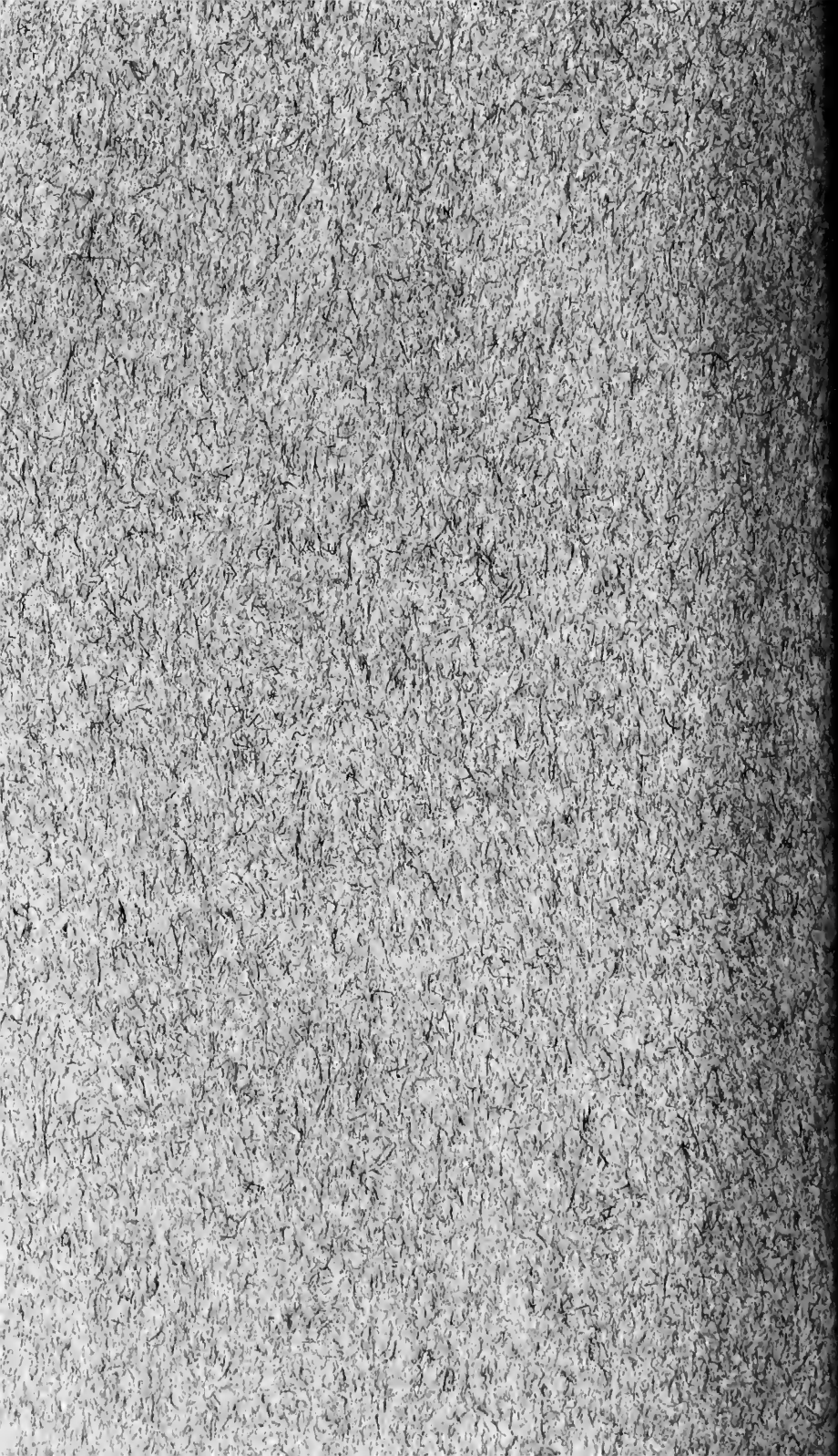
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NOV 26 1958



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 16097

ROBERT E. AUSTIN and MARIAN H. AUSTIN,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**On Petition for Review of the Decision of the
Tax Court of the United States**

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 17-29) are not officially reported.

JURISDICTION

This appeal involves deficiencies in income tax as determined by the Commissioner against the taxpayer¹ for the calendar years 1950, 1951 and 1952 in the total amount of \$2,502.30. (R. 17.) On Decem-

¹ Robert E. Austin is hereinafter referred to as the taxpayer, his wife being included as a party merely because joint returns were filed.

ber 31, 1954, the Commissioner of Internal Revenue mailed to the taxpayer notice of a deficiency. (R. 6-12.) Under the provisions of Section 272 of the Internal Revenue Code of 1939, taxpayers on March 25, 1955, filed a petition for redetermination of the deficiencies as determined by the Commissioner. (R. 3-5, 12.) The decision of the Tax Court was entered on April 28, 1958. (R. 30.) Petition for review by this Court was filed on June 16, 1958. (R. 30-31.) This Court, therefore, has jurisdiction of the case under Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether the evidence supports the Tax Court's holding that certain real estate lots were held primarily for sale to customers in the ordinary course of taxpayer's trade or business, within the meaning of Section 117 of the 1939 Code, and, accordingly, that the gain realized on the sale of such property was subject to taxation as ordinary income.

STATUTES AND REGULATIONS INVOLVED

These are set out in the Appendix, *infra*.

STATEMENT

The facts, as found by the Tax Court (R. 17-26), may be summarized as follows:

During the period 1943 through 1950, the taxpayer, who has been a practicing attorney since 1912, purchased or otherwise acquired 168 lots and parcels of land in 24 separate transactions in and around the Manhattan California Beach area. His law office is

in Los Angeles; however, he has resided in Manhattan Beach since 1929, although he acquired property (by transfers for legal services) in Manhattan Beach in 1918. The population of the area, which was primarily a resort area located 19 miles south of Los Angeles, was only 5,000 in 1929 when the taxpayer established his permanent residence there. (R. 18-19.)

Since 1932 the taxpayer has been active in the civic affairs of the Manhattan Beach area, being a member of the School Board; assisting in organizing the local water district and serving as a member of its board of directors; and representing the water district on the board of Metropolitan Water District of Southern California. (R. 18.)

It was stipulated that the following real estate acquisitions were made by the taxpayer during the period 1943-1952. (Some lots, in addition to the foregoing, were also acquired by taxpayer during this period.) (R. 18-19.)

<u>Year</u>	<u>No. of Transactions</u>	<u>No. of Lots</u>
1943	2	2
1944	2	5
1945	3	69½
1946	6	64½
1947	6	16
1948	3	9
1949	1	1
1950	1	1
1951	0	—
1952	0	—

The lots acquired in 1943 were purchased at an auction of tax delinquent properties. The taxpayer

and others, prior to the auction, asked the local tax collector to include certain lots among those scheduled for sale, and agreed to make opening bids on these lots. Taxpayer bid on 30 or 40 lots at this auction. He purchased one lot for a friend who at the time of the bidding had used up his available funds. (R. 19.)

Three of the lots acquired in 1944 were received in payment for taxpayer's legal services. Taxes were never paid by him on this property and the lots were subsequently sold to meet the tax bill. Two other lots acquired in that year were located across the street from where taxpayer was then residing, and were purchased to protect the character of the neighborhood. (R. 19.)

One hundred and two of the lots acquired during 1945 and 1946 were sold to taxpayer by the City of Manhattan Beach. The sales arose from the following circumstances: Certain property, located in Manhattan Beach (sometimes hereinafter referred to as the city), was owned by the State of California and was not on the city's tax rolls. In order to list the property on the city's tax rolls it had to be privately owned, and the officials of the city were desirous of bringing about this result. Accordingly, a plan was devised whereby the city could acquire the property and then sell it to private parties. This plan entailed expenditures in amounts greater than the officials of the city were prepared to undertake. To aid in carrying out the plan the taxpayer and three others agreed to pay the city any loss it might suffer as a result of this plan. In accordance with this agreement taxpayer purchased 102 lots which the city had acquired

from the State and which it was unable to dispose of at public auction. (R. 19-20.)

Taxpayer acquired two lots in 1945 from a Mr. Friedman, one of his clients. (R. 20.)

Taxpayer purchased nine lots from the Pacific Land and Title Company in 1945. These purchases were connected with his membership in the Manhattan Beach Property Owners Association and that association's interest in acquiring a park. (R. 20.)

Two of the lots acquired by taxpayer in 1946 were located across the street from where he then resided, and were purchased to protect the character of the neighborhood. (R. 20.)

Taxpayer acquired 21 lots in 1946 from the Amaranth Land Company under the following circumstances: A client of taxpayer's was involved in a joint venture concerning real property. At the death of the client taxpayer was retained by the deceased's family to represent them in the disposition of the joint venture's property. In the course of winding up the joint venture, and while acting on behalf of the family, taxpayer entered the highest bid for the property. The family was interested in improving its cash position, and was disappointed in taxpayer's actions on their behalf. He paid the amount bid to the joint venture and the property was sold to him. (R. 20-21.)

Taxpayer purchased one lot in 1946 and four lots in 1947 which adjoined property already owned by him. The new acquisitions were to provide automobile parking facilities should future improvements on the original lots make such facilities necessary or appropriate. (R. 21.)

Taxpayer acquired two tracts of land, referred to as "lots" by the parties, in 1947 which totaled 125 acres. Part of this acquisition was received by him in payment for legal services. (R. 21.)

Taxpayer purchased six lots in 1947 for possible use as a site for a house. He built a house on these lots toward the end of 1948, and since that time it has been his home. Two other lots acquired by him in 1947 were transferred by a couple who had earlier been given the property by taxpayer with the understanding that they (the couple) pay for it whenever able. The uncertain financial position of the couple in 1947 resulted in the retransfer of the property. (R. 21.)

Two lots purchased by taxpayer in 1947 from a real estate broker were subsequently improved, and supplied him with rental income. (R. 22.)

Two additional lots were acquired in 1947 under the following circumstances: On one occasion in 1947 a client, Mr. Clendennin, came to taxpayer's office and discussed with him problems concerning certain lots owned by the client's daughter. Clendennin thought that his daughter would eventually lose money on these lots. He returned about one week later, told taxpayer that he had been advised that he (the client) did not have long to live, and asked taxpayer to purchase the daughter's property. Taxpayer purchased two lots from the daughter; shortly thereafter the client died. (R. 22.)

Four lots acquired in 1948 were purchased for residential purposes, and taxpayer lived in the house thereon during 1948. He sold this property after

moving into the house built on the six lots mentioned above. (R. 22.)

Taxpayer purchased three lots in 1948 from the Pacific Land and Title Company. (R. 22.)

One lot was purchased in 1949 to make available additional parking and sewage facilities to a building, owned by taxpayer, which housed a laundry. (R. 22.)

Taxpayer purchased one lot in 1950 from a neighbor who was unable to pay a debt to him. (R. 22.)

Taxpayer made the following sales of real property, payment for which was sometimes made in installments (R. 23):

<u>Year</u>	<u>No. of Transactions</u>	<u>No. of Lots</u>
1946	24	38
1947	8	13
1948	22	26
1949	7	15
1950	5	11
1951	8	23
1952	10	14
1953	4	? ²
1954	1	?
1955	5	?

Taxpayer acquired the lots sold in 1950, 1951 and 1952 in the following years (R. 23):

<u>Year Lot Acquired</u>	<u>Year Lot Sold</u>		
	<u>1950</u>	<u>1951</u>	<u>1952</u>
1943	1		
1944			2
1945	4	1	4
1946	6	20	6
1947			1
1948		2	
1949			1

² Question marks are used herein to indicate the absence of relevant evidence in the record.

Taxpayer made sales of real property in the following total amounts (R. 23) :

1950	\$ 7,750.00
1951	15,750.00
1952	21,584.32

During the three years in issue the taxpayer sold 48 lots or parcels of land in 23 separate transactions for the total sum of \$45,084.32. During the seven-year period 1946-1952, the taxpayer sold at least 140 lots in 84 separate transactions. (R. 23-24.)

Taxpayer's gross income for the years 1943 through 1952 was composed of the following items (R. 24) :

		Income from	Number of Law Practice Fee Collections	Gross Amount Law Practice Fee Collections	Net Collections From Law Practice	Net Profit On Real Estate Sales	Gross Income
ar	Rent	Interest					
43	1,890.00	195.00	101	3,849.10	1,832.93	.....	5,934.10
44	1,140.00	.....	106	6,628.23	4,434.48	678.00	8,446.23
45	.....	.....	122	9,081.18	5,444.90	210.32	9,291.50
46	.....	.....	89	5,345.00	1,756.62	17,655.71	23,000.71
47	7,596.00	390.00	77	7,649.15	3,502.89	12,357.70	27,992.85
48	10,762.79	288.40	76	5,977.40	2,166.40	6,737.12	23,765.71
49	5,838.50	696.38	83	6,079.19	1,476.43	6,029.72	18,643.79
50	5,456.00	522.51	91	5,232.67	1,162.91	7,782.56	37,637.56
51	6,820.94	897.72	140	9,360.80	4,851.60	10,476.79	27,556.29
52	7,125.00	2,144.07	117	6,156.68	1,279.08	9,308.59	24,734.36

The net profit on real estate sales shown above for the years 1950 through 1952 includes the profit from installment payments received in those years on account of 12 sales made in prior years. (R. 24-25.)

Taxpayer's income from his law practice and his real estate sales for 1953, 1954 and 1955 was as follows (R. 25) :

Year	Net Profit on Real Estate Sales	Gross Amount Law Practice Fee Collections	Net Amount Law Practice Fee Collections
1953	\$ 9,256.24	?	?
1954	16,675.56	\$7,567.00	\$2,825.00
1955	19,822.00	9,900.00	4,544.00

The net profit on real estate sales shown above for the years 1953 through 1955 includes installment payments received in those years on account of sales made in prior years. (R. 25.)

Taxpayer did not advertise in connection with his real property, nor did he post any "for sale" signs. He did not list the property with real estate brokers, and neither he nor his wife was a licensed real estate broker. He did not maintain an office in his home, and his home telephone number was listed under the name of Marian H. Austin, his wife. (R. 25.)

Sales were initiated by prospective customers contacting taxpayer through the mails or over the telephone. Negotiations were conducted in the same manner, and taxpayer often did not come into personal contact with purchasers. On some occasions sales were initiated by brokers. On these occasions the brokers were acting for third parties. (R. 25.)

Whenever necessary taxpayer would prepare legal documents in connection with a sale in his law office. Prospective customers never came to his law office. Most of the sales involved were closed in escrow offices, not at taxpayer's home. (R. 25-26.)

Taxpayer sometimes borrowed money from banks to help finance real property purchases. (R. 26.)

There has been a large amount of real estate development in Manhattan Beach since 1945. People

interested in purchasing property in Manhattan Beach went through the tax rolls to learn the names of property owners. Owners of property received numerous unsolicited inquiries concerning their property. Taxpayer was aware of this situation. (R. 26.)

The real property owned by taxpayer was listed on the tax rolls under the names of Robert E. Austin and Marian H. Austin at their home address. (R. 26.)

The Commissioner determined that the lots sold by taxpayer were held by him primarily for sale to customers in the ordinary course of trade or business. The Tax Court upheld that determination. (R. 17, 26.) It is from this holding that the taxpayer petitioned this Court for a review.

SUMMARY OF ARGUMENT

The Tax Court found that the 48 real estate lots in issue were held for sale in the ordinary course of taxpayer's trade or business and accordingly, that the gain from their sale is taxable as ordinary income, rather than as capital gain under Section 117 of the Internal Revenue Code of 1939. The courts have held uniformly that this type of issue is a factual one; that no one fact or factor is determinative of the issue; and that upon review, the lower court's decision will not be disturbed unless it is "clearly erroneous" or is adduced from an erroneous view of the law.

This review necessarily requires an examination of the entire record by the Court. In making such an examination it will be seen that there was ample

evidence before the Tax Court to justify its findings and conclusion, particularly in the light of the decided cases by this Court and other appellate courts on the subject.

The taxpayer contends that, in purchasing or otherwise acquiring more than 168 lots in eight years and selling over 140 lots in ten years, he was engaged in activities which amounted to an investment of his funds and the liquidation of such investment. The evidence is inconsistent with the latter content and shows, among other things, (1) the acquisition of such lots in a growing beach resort area with the admitted purpose of resale at a profit; (2) frequent and continuous sales of lots and building sites in a ready-made market requiring no ostensible sales campaign by the taxpayer; (3) activity or "busyness" on the part of the taxpayer in purchasing property, constructing buildings, renting property and the handling of most purchases and sales and all of the sales details and paper work personally in his law office, particularly concerning the lots in issue, thereby indicating an over-all pattern of engagement in the real estate business; and (4) substantial income from real estate sales which exceeded greatly his income from professional fees as an attorney.

The Tax Court exercised its function with care and its findings and decision are supported fully by the record.

ARGUMENT

**The Evidence Supports The Tax Court's Finding That
The Lots In Issue Were Held By Taxpayer Primarily
For Sale To Customers In The Ordinary Course Of
His Trade Or Business**

The issue for determination is whether the gain realized from the sale of the lots and parcels in question is to be taxed as ordinary income or is to be afforded treatment as a long-term capital gain. It is taxpayer's contention that the properties constituted capital assets, that they were acquired and held as an investment, and that their sale was in the nature of a liquidation of capital assets. (R. 4, 34; Br. 2.)

Section 117(a) (1) of the Internal Revenue Code of 1939 (Appendix, *infra*) defines capital assets as property held by the taxpayer, but excludes from its definition, *inter alia*, "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, * * *." The Commissioner determined, and the Tax Court found as a fact (R. 17, 26), that the lots in issue were held primarily for sale to customers in the ordinary course of taxpayer's trade or business.

This finding by the Tax Court is determinative of the issue and will be accepted if supported by the evidence. The question is one of fact and the lower court's findings will not be set aside unless they are "clearly erroneous" and are induced by an erroneous view of the law. The established rule was stated by this Court in *Stockton Harbor Indus. Co. v. Commissioner*, 216 F. 2d 638, 650:

As stated in the outset, the scope of our review is limited. * * * We cannot substitute our judg-

ment as to facts for that of the Tax Court, and can only upset the findings if there is no substantial evidence to support them. What is and what is not trade or business and when property is or is not held for sale to customers are questions of fact.³

See, also, *Higgins v. Commissioner*, 312 U.S. 212, rehearing denied, 312 U.S. 714; *Harriss v. Commissioner*, 143 F. 2d 279 (C.A. 2d); *Saltzman v. Commissioner*, 227 F. 2d 49 (C.A. 3d); *Williamson v. Commissioner*, 201 F. 2d 564 (C.A. 4th); *Fackler v. Commissioner*, 133 F.2d 509 (C.A. 6th); *Murray v. Commissioner*, 238 F. 2d 137 (C.A. 10th); and these recent decisions of this Circuit, *Bistline v. United States*, No. 15,716, decided May 13, 1958 (1 A.F.T.R. 2d 1813); *Achong v. Commissioner*, 246 F. 2d 445.

The courts have given consideration to a number of elements in resolving this question. The following summary of these factors, contained in this Court's

³ This statement was adopted by this Court in the recent case of *Pool v. Commissioner*, 251 F. 2d 233, 235. And the Fifth Circuit, in the latest of a long line of cases on the subject, made this statement (*Gamble v. Commissioner*, 242 F. 2d 586, 590):

Each case must be decided on its own facts. The question as to whether property was held * * * for sale * * * is principally a fact question, and one where the Tax Court has the function of making the original determination through the process of weighing and balancing conflicting facts and factors and drawing from these the inferences and conclusions upon which a decision is to be based.

See also, Rule 52(a), Federal Rules of Civil Procedure, and Section 7482(a), Internal Revenue Code of 1954.

opinion in *Stockton Harbor Indus. Co. v. Commissioner*, *supra*, p. 650, was adopted in the more recent case of *Pool v. Commissioner*, 251 F. 2d 233, 235-236 (C.A. 9th):

Many tests have been proposed by this and other courts. Among them are: (1) the nature of the acquisition of the property, (2) frequency and continuity of sales over a period of time, (3) the nature and extent of the taxpayer's business, (4) the activity of the seller about the property, such as the extent of his improvements or his activity in promoting sales, (5) the extent and substantiality of the transaction and the like. * * * But in the last analysis, each case must be determined upon its own specific facts, for none of these incidences are present in all cases.

As indicated in *Stockton Harbor*, in few, if any, of the cases are all of these factors present or applicable. And as the Fifth Circuit has pointed out (*Gamble v. Commissioner*, 242 F. 2d 586, 590), "No single evidentiary fact will be decisive in the usual case." See also, *Pool v. Commissioner*, *supra*, pp. 235-236.⁴

In reviewing the record, this Court will discover that the Tax Court's ultimate findings were not only free from clear error, but were amply warranted by the evidence when considered in the light of the decided cases.

Taxpayer contends that his only business or profession was that of an attorney, that his activity in buying and selling property was carried on independently of his law profession and that the time spent

⁴ Taxpayer apparently argues that all of these factors must be satisfied in order to find a business. (Br. 11, 26.)

in the conduct of such real estate activity was insignificant in comparison with the time spent in his law practice. (R. 4, 5, 39, 71.) However, it is well established that one may engage in more than one business at one time, and that in a situation such as exists here, the holding for sale and the selling of property does not necessarily require the taxpayer to devote a substantial portion of his time to such endeavors. *United States v. Beard*, No. 15,560, decided May 26, 1958 (C.A. 9th) (1 A.F.T.R. 2d 1830); *Rollingwood Corp. v. Commissioner*, 190 F. 2d 263 (C.A. 9th); *King v. Commissioner*, 189 F. 2d 122 (C.A. 5th); *Di Lisio v. Vidal*, 233 F. 2d 909 (C.A. 10th). More particularly, one may, and often does, engage in the practice of law and, at the same time actively engage in the real estate business. *Gamble v. Commissioner*, *supra*; *Murray v. Commissioner*, *supra*; *Saltzman v. Commissioner*, *supra*; *Fackler v. Commissioner*, *supra*. Taxpayer overlooks the fact that one may ostensibly be engaged in a principal endeavor and at the same time be conducting one or more businesses out of his hip pocket, so to speak, in such a manner as to subject himself to the same liability for income taxes as others who are conducting similar businesses as their sole occupation.⁵

⁵ Unless a realtor is liquidating a rental project or handling property as an investment apart from his regular business, cases concerning this issue do not ordinarily involve a person or firm engaged principally in the real estate business. The difficulty arises when one, who has another and primary occupation, commences to deal in the purchase and sale of property for profit, generally as a side line. *Rollingwood Corp. v. Commissioner*, *supra*, p. 266; *Pool v. Commissioner*, *supra*, p. 236. In the *Gamble*, *Murray*, *Saltzman* and

During the period 1943 through 1950, the taxpayer purchased or otherwise acquired at least 168 lots and parcels (two of the so-called lots contained 125 acres) of land in 24 separate transactions in and around Manhattan Beach, a fast growing resort area. (R. 18-19, 26, 80.) While he maintained his law office in Los Angeles, he resided in Manhattan Beach, where he became active in civic affairs, serving on the School Board, the local water district board and the Manhattan Beach Property Owners Association. (R. 18.) In the latter capacity, which consumed a substantial amount of his time (R.39), he assisted in obtaining many improvements to the area, such as streets, parks, and "so on" (R. 53).

Because of the active part he played in civic affairs and because of his extensive real estate holdings and dealings,⁶ taxpayer was well known throughout the

Fackler cases, *supra*, as well as in *Fahs v. Crawford*, 161 F. 2d 315 (C.A. 5th); *Ross v. Commissioner*, 227 F. 2d 265 (C.A. 5th), attorneys were involved; in *Smith v. Dunn*, 224 F. 2d 353 (C.A. 5th), an architect; in *Di Lisio v. Vidal*, *supra*, a banker; in *White v. Commissioner*, 172 F. 2d 629 (C.A. 5th), a paving contractor; in *Bistline v. United States*, *supra*, a business manager of a transit company; and in *United States v. Beard*, *supra*, the president of a refrigerating company. In practically all of the cases involving persons other than realtors the taxpayers have not held a real estate agent's or broker's license, but it is well settled that this is not a prerequisite to the conduct of a real estate business under Section 117(a), *Lobello v. Dunlap*, 210 F. 2d 465 (C.A. 5th); *King v. Commissioner*, *supra*.

⁶ In addition to the extensive lot purchases, the taxpayer improved some lots and constructed a few buildings in the area, one which contained a laundry (R. 22, 64, 66); bought property adjacent to potentially good business lots (R. 61); purchased lots to gain access to and "fill out or build up"

area. Bankers, real estate agents, brokers, builders, civic leaders and others came to him frequently concerning the purchase and sale or development of property. (R. 47, 48, 52, 53, 60, 61, 62, 63, 67, 68, 77, 85.) As he testified, "a good many of my friends knew that I had some lots around" (R. 85), "brokers have frequently called me seeking lots for builders" (R. 77); and he had a flood of unsolicited inquiries concerning the sale or purchase of property (R. 81).

The taxpayer was aware of the potential growth of the Manhattan Beach area, of the rising demand for vacant lots and of the fact that such lots would increase in value (R. 80, 81, 84) although he would have the Court believe that he was improvident in purchasing the lots and that he only "stumbled" into a good business proposition. (Br. 19-20.) He testified that the usual procedure was for prospective purchasers to check the tax rolls in order to ascertain the names of the owners of various lots throughout the area, that he knew of such demand (R. 84), and that he carried the lots owned by him in his name and in the name of his wife (R. 46-47).

One of the factors considered by the courts is the purpose for which the property was acquired. The general rule is stated by this Court in *Palos Verdes Corp. v. United States*, 201 F. 2d 256, and in *Rollingwood Corp. v. Commissioner*, *supra*, p. 266, wherein it is pointed out that while the purpose for which the property was acquired is of some weight, the ultimate

sites already owned by him (R. 62-63); purchased property for sewage disposal; purchased five lots and built thereon an automobile agency (R. 83); and purchased lots which were later given to or sold to a church (R. 62).

question is the purpose for which it was held at time of sale. The Fifth Circuit has stated the rule thus (*Gamble v. Commissioner, supra*, p. 590):

While the ultimate concern is the purpose for which the property was held at time of the sale, it is necessary to consider also the purpose for which it was held prior to sale.

The taxpayer contends that he purchased or otherwise acquired the lots either as an investment or in furtherance of his desire to be of aid to the community of Manhattan Beach.⁷ (Br. 2, 12-15.) However, his continuous real estate activity and his own testimony indicate a contrary intent. He was always interested in acquiring property as payment for legal services or through purchase if he could get "a good buy". (R. 70-71.) He continuously maintained a heavy inventory of lots and was always willing to sell in order to turn his land into money. (R. 47.) He borrowed money whenever he was short of funds. (R. 26, 81.) He testified further that he purchased the 102 lots in 1945 and 1946 with the expectation that they would pay off sometime in the future (R. 42); that he acquired each and every lot with the hope of making a profit (R. 82) and, in fact, that he did make a profit on every lot sold (R. 80-81).⁸ It is

⁷ None of the property was inherited. (R. 75.)

⁸ As this Court observed in *Pool v. Commissioner, supra*, p. 242, in applying the law of taxation, the courts have drawn a distinction between one who buys property as a long-term investment and the person who buys for speculation in the expectation of a rise in the price and who, as taxpayer testified he did here, buys for resale to any buyer for a profit.

clear that the lots and parcels were acquired by the taxpayer for the purpose of resale at a profit. The lower court's statement on this point is of interest. After hearing the testimony of the taxpayer and weighing it against the whole record the court said (R. 29) :

* * * even as to their intents and purposes at the time of acquisition, the record does not convince us of all that petitioners would have us believe. They would have us believe that many, if not most, of the acquisitions were motivated by altruism and civic and moral responsibilities. The * * * testimony is far from convincing.

Congress, in passing Section 117, intended to afford relief to taxpayers whose property has increased in value over a period of time. However, if the taxpayer engages in an activity or business “* * * separable from his investment, it is not unfair that his gain should be taxed as ordinary income.” *Galena Oaks Corp. v. Scofield*, 218 F. 2d 217, 220 (C. A. 5th).

Here taxpayer would have the court believe that he was investing his money and that the subsequent sales were in the nature of a liquidation of such investments. Yet, his testimony shows that he was continuously ready to (and did) purchase property if he could obtain a bargain, even borrowing money to do so when necessary, that he maintained a constant inventory of lots and was willing to sell at any time he could make a profit (and, in fact, he did profit from every transaction). These facts, coupled with the following discussion of the lower court's findings

concerning sales, make it clear that here we do not have a gradual and passive liquidation of an investment.

During the seven-year period, 1946-1952, the taxpayer sold 140 lots in 84 separate sales transactions. The gross sales price of the lots sold is not in the record; however, taxpayer's total *net* income from the sale of real estate during these years was \$70,-348.19, better than an average of \$10,000 each year.⁹ (R. 24-25.) In the three years under consideration, the taxpayer sold 48 lots or parcels of land in 23 transactions for a gross price of \$45,084.32. (R. 23.) His net income from real estate sales for the three years was \$27,567.94, or an average of \$9,189.31 for each year.¹⁰ (R. 24.) The taxpayer stipulated that the court could consider years other than those in issue in order to obtain a clearer picture of the years in question and in order to make a finding as to whether the taxpayer was, in fact, in the real estate business. (R. 52.) The courts have recognized that, in arriving at an answer to the basic question in cases of this type, it is essential that consideration

⁹ When the net profit for the years 1953-1955 is added, the total *net* income from real estate sales in the ten-year period totals \$116,101.99 and the average per year is \$11,610.20. (R. 24-25.) On brief (pp. 15, 17) taxpayer speaks of a "dribbling" of sales over the years.

¹⁰ As the lower court points out, the net profit on real estate sales for the three years includes profits from installment payments made on sales consummated in prior years. Likewise, it is probable that the net profit from real estate sales in 1953-1955 of \$45,753.80 included some of the sales made in the years 1950-1952. (R. 24-25.)

be given to the overall pattern of taxpayer's business and activity as revealed in the record. *Snell v. Commissioner*, 97 F. 2d 891 (C. A. 5th); *King v. Commissioner*, *supra*; *Pool v. Commissioner*, *supra*; *Saltzman v. Commissioner*, *supra*. In the recent case of *Goldberg v. Commissioner*, 223 F. 2d 709, the Fifth Circuit said (pp. 712-713):

Furthermore, if the owner was contemporaneously, or soon before or after, buying and selling other properties on his own account as a dealer, appellate courts have found that this evidence supported factual findings resulting in the denial of capital gain benefits * * *.

See also *Gamble v. Commissioner*, *supra*, and *Harriss v. Commissioner*, *supra*.

The taxpayer, before, during and after the years in issue, in addition to his purchasing activity, was busy disposing of his property through cash or installment sales. An indication of the extent of his "busyness" is revealed by the fact that he (1) handled the negotiations involved in a large portion of the sales (some prospective buyers were brought to him by brokers who were aware that he had property for sale) (R. 43, 47, 77, 82, 83); (2) conducted all of the legal and paper and other detailed work personally (R. 78-79);¹¹ (3) handled the originating and collection details of numerous installment sales (R. 23, 43, 78); (4) "borrowed a good deal of money

¹¹ In spite of taxpayer's statement that he conducted all of the real estate business in his law office, the record shows that he spent considerable time at his home and elsewhere in such activity. (R. 43, 46, 63, 67, 71.)

from banks * * *” to make improvements and to make up mortgages (R. 81); (5) arranged for loans to finance installment purchases which was deducted as a business expense (R. 26, 81; Joint Exs. Nos. 1-A, 2-B, 3-C, 4-D); (6) constructed at least two or three buildings, to make other improvements, and carried on a substantial rental business. (R. 15, 61-62, 73, 83-84). These activities, coupled with the frequency, continuity, and substantiality of purchase and sales transactions, resulting in a substantial and steady income therefrom, and the other facts of record place the taxpayer squarely in the real estate business as well as the practice of law. *Gamble v. Commissioner, supra*; *Murray v. Commissioner, supra*.

The taxpayer places reliance upon the fact that he did not engage in an active advertising or promotional campaign in disposing of the lots. Aside from the fact that this is only one of the factors bearing upon the question, and one that has been held not to be controlling by the courts,¹² the taxpayer admits that a seller's market existed. (R. 84.) He stated that the Manhattan Beach area was a growing

¹² Among the numerous cases in which there was no advertising or similar promotional activity and in which the courts held that the taxpayer was engaged in the business of selling property to customers in the course of this business are: *Gamble v. Commissioner, supra*; *Murray v. Commissioner, supra*; *Saltzman v. Commissioner, supra*; *Lobello v. Dunlap, supra*; *Galena Oaks Corp. v. Scofield, supra*; and this Circuit in *Pacific Homes, Inc. v. United States* 230 F. 2d 755, and *Rollingwood Corp. v. Commissioner, supra*. In *Rollingwood*, speaking of this factor, this Court said (p. 267) “but the number of sales speak for themselves.”

community during the years in issue, its population having increased from 5,000 to 35,000 (R. 80-81, 88), and that there was a corresponding growth in the demand for vacant lots (R. 84); that there was a building boom and a great amount of development around the area (R. 80-81, 84-85); that a good many of his friends and others knew that he had lots for sale (R. 85); that frequently brokers and builders called him direct concerning the purchase of lots (R. 76, 77); and that all of these factors combined to create a flood of unsolicited inquiries covering the purchase and sale of property (R. 81). It is submitted that, under these circumstances, the Tax Court was justified fully in finding the lack of advertising to be of little importance—a seller's market making such activity unnecessary. (R. 28.)

Finally, and in completing the picture of taxpayer's activity in the purchase and sale of real property, the Tax Court had before it evidence that taxpayer's income from realty sales far exceeded his fees as an attorney. (R. 24-25, 27-28.) It has been held pertinent to a determination of the present issue for the courts to consider the relation of income from real estate sales to that of the taxpayer's claimed profession. Likewise, this may be done to determine the taxpayer's intention and purpose at the time of sale as well as the results of his action. *Winnick v. Commissioner*, 223 F. 2d 266 (C. A. 6th), affirming 21 T. C. 1029; *Mauldin v. Commissioner*, 195 F. 2d 714 (C. A. 10th); *Snell v. Commissioner*, *supra*; *Gamble v. Commissioner*, *supra*; *Saltzman v. Commissioner*.

In all except two of the years 1946-1955,¹³ taxpayer's *net* income from real estate sales exceeded *gross* receipts from his law practice. In nine of these years the net income from realty sales was greatly in excess of the *net* income from his law practice. In 1950, the ratio was about \$7 to \$1; in 1951, \$7.50 to \$1; and in 1952, \$9 to \$1. In total for the three years, net income from law practice was \$7,293.59 (gross \$20,750.15) compared with net income from real estate sales of \$27,567.94 (gross \$45,084.32). (R. 24-25.)¹⁴

As indicated in its opinion (R. 27, 29) the Tax Court took into account the number of purchases and sales, the frequency and continuity of transactions, as well as the other facts of record, and found as an ultimate fact the lots in issue were held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. We submit that the Tax Court exercised its function with care in considering all of the facts of record and that its findings and decision are supported by the record. It cannot be said from a review of the evidence that the Tax Court's ultimate finding was clearly erroneous.

¹³ Information of law practice fees is not available for 1953, while *gross* law practice fees for 1949 exceeded *net* profit from real estate sales by only \$49.47. (R. 24-25.)

¹⁴ In addition, the taxpayer had rental income of \$46,629.23 for the ten-year period 1943-1952 and interest income of \$5,134.08 for the same period. In total, his net income was as follows for the period 1943-1952 (R. 24-25) :

Law Practice	Real Estate Sales, Rent & Interest	Total
\$27,908.24	\$122,999.82	\$150,908.06

CONCLUSION

The decision of the Tax Court is correct and should therefore be affirmed.

Respectfully submitted,

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NOVEMBER, 1958.

APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition*.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 117. CAPITAL GAINS AND LOSSES.¹⁵

(a) *Definitions*.—As used in this chapter—

(1) [as amended by (Sec. 115(b) of the Revenue Act of 1941, c. 412, 55 Stat. 687, and Sec. 151(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798.]) *Capital assets*.—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be

¹⁵ Section 117(a) (1) was rewritten by Section 210(a) of the Revenue Act of 1950, effective for taxable years beginning after September 23, 1950, but not to an effect material in this case.

included in the inventory of the taxpayer if on hand at the close of the taxable year, or properly held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), * * * or real property used in the trade or business of the taxpayer;

* * * *

(26 U.S.C. 1952 ed., Sec. 117.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.22(a)-1. *What Included in Gross Income.*—Gross income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits and income derived from any source whatever, unless exempt from tax by law. (See sections 22(b) and 116.) In general, income is the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets. * * *

* * * *

SEC. 29.117-1. *Meaning of Terms.*¹⁶—The term “capital assets” includes all classes of property not specifically excluded by section 117(a) (1).

¹⁶ Amended by T. D. 5951, 1952-2 Cum. Bull. 81; but not to an effect applicable to this case.

In determining whether property is a "capital asset," the period for which held is immaterial.

The exclusion from the term "capital assets" of property used in the trade or business of a taxpayer of a character which is subject to the allowance for depreciation provided in section 23(1) and of real property used in the trade or business of a taxpayer is limited to such property used by the taxpayer in the trade or business at the time of the sale, exchange, or involuntary conversion. Gains and losses from the sale or exchange of such property are not subject to the percentage provisions of section 117(b) and losses from such transactions are not subject to the limitations on losses provided in section 117(d), except that under section 117(j) the gains and losses from the sale or exchange of such property held for more than six months may be treated as gains and losses from the sale or exchange of capital assets, and may thus be subject to such limitations. See section 29.117-7. Property held for the production of income, but not used in a trade or business of the taxpayer, is not excluded from the term "capital assets" even though depreciation may have been allowed with respect to such property under section 23(1) prior to its amendment by the Revenue Act of 1942. However, gain or loss upon the sale or exchange of land held by a taxpayer primarily for sale to customers in the ordinary course of his business, as in the case of a dealer in real estate, is not subject to the limitations of section 117(b), (c), and (d). The term "ordinary net income" as used in these regulations for the purposes of section 117 means net income ex-

clusive of gains and losses from the sale or exchange of capital assets.

* * * *

SEC. 29.117-7 [as amended by T. D. 5394, 1944 Cum. Bull. 274, 276]. *Gains and Losses from Involuntary conversions and from the Sale or Exchange of Certain Property Used in the Trade or Business.*—Section 117(j) provides that the recognized gains and losses

(a) from the sale, exchange, or involuntary conversion of property used in the trade or business of the taxpayer at the time of the sale, exchange, or involuntary conversion, held for more than six months, which is

(1) of a character subject to the allowance for depreciation provided in section 23(1), or

(2) real property,

provided that such property is not of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or is not held by the taxpayer primarily for sale to customers in the ordinary course of trade or business, and

* * * *

shall be treated as gains and losses from the sale or exchange of capital assets held for more than six months if the aggregate of such gains exceeds the aggregate of such losses. If the aggregate of such gains does not exceed the aggregate of such losses, such gains and losses shall

not be treated as gains and losses from the sale or exchange of capital assets.

* * * *

Sections 39.22(a)-1, 39.117(a)-1 and 39.117(j)-1 of Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939, applicable for the taxable year 1952, are substantially the same as the above-quoted sections of Treasury Regulations 111.

No. 16097.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT E. AUSTIN and MARIAN H. AUSTIN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Review of the Decisions of the Tax Court
of the United States.

PETITIONERS' REPLY BRIEF.

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FILED

DEC 22 1958

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On Petition for Review of the Decisions of the Tax Court
of the United States.

PETITIONERS' REPLY BRIEF.

There seems to be no difference of opinion as to the facts. However, there is a difference of opinion as to whether those facts sustain a finding that the real estate sold by petitioner in 1950, 1951 and 1952 was held by him "primarily for sale to customers in the ordinary course of his trade or business."

Careful reading of the authorities cited by respondent reveals that in each case there were activities that "resulted in trade or business" or "constituted conduct of a real estate business." For the purpose of showing the

court that petitioner's activities were such as to result in such trade or business respondent sets up six activities (Resp. Br. pp. 21, 22) as follows:

Taxpayer:

1. Handled the negotiations involved in a large portion of the sales (some prospective buyers were brought to him by brokers who were aware that he had property for sale) [R. 43, 47, 77, 82, 83];

2. Conducted all of the legal and paper and other detailed work personally [R. 78-79];

3. Handled the originating and collection details of numerous installment sales [R. 23, 43, 78];

4. "Borrowed a good deal of money from banks * * *" to make improvements and to make up mortgages [R. 81];

5. Arranged for loans to finance installment purchases which was deducted as a business expense [R. 26, 81; Joint Exs. Nos. 1-a, 2-B, 3-C, 4-D]; and

6. Constructed at least two or three buildings, to make other improvements, and carried on a substantial rental business. [R. 15, 61-62, 73, 83-84.]

We will discuss each of these activities.

Discussion of Activities Relied Upon by Respondent.

1. The evidence shows that negotiations consisted simply of an inquiry by a possible buyer of the price and terms as to which a particular lot might be purchased, and the answer by taxpayer furnishing that information. [R. 71.] Taxpayer's time consumed in answering such an inquiry either by telephone or by postal card was infinitesimal. [R. 71.] There was no negotiation on any sale other than the inquiry about the price and terms and the answer giving it. Respondent's citations of the

record do not sustain the theory that there were important or extensive or any negotiations.

2. The evidence shows that whaever legal work there may have been, the filling out of a deed, trust deed and note, was sometimes taken care of by taxpayer, but frequently in the escrow offices. [R. 78, 88.] In any event that service has none of the elements of carrying on a business. The sale if made and the business done, if any, was all completed before the time arrived to fill out the papers carrying it into effect, and such clerical activity could in no sense be construed as carrying on a real estate business.

3. It does appear that taxpayer received or collected payments made by purchasers for real estate sold, but this like filling out blanks necessary to convey the title and evidence the unpaid portion of the purchase price, if any, in no sense constitutes conducting a real estate business, or puts the taxpayer who received the payments in the position of carrying on a trade or business, or constitutes the persons making the payments customers.

4. The fourth activity that of borrowing money from banks to make improvements and to make up mortgages would certainly in no sense be either conducting a real estate business or put the borrower in a trade or business. Every investor at one time or another borrows money to develop or increase his investments. The record contains the following testimony of taxpayer "I borrowed a good deal of money from the banks . . . I made some improvements and found myself short of money, and went to the bank and borrowed money to make up the shortage." [R. 81.] No other evidence appears in the record on that subject. The charge here involves the specific properties sold in 1950, 1951 and 1952. There

was no money borrowed on those properties or mortgages made up, and borrowing money to improve other properties shown to be substantial rent producers could not constitute holding these properties primarily for sale to customers.

5. Nowhere in the record do we find any evidence that taxpayer arranged for loans other than above, or arranged to finance installment purchasers, or that any expense was incurred for such purpose, or was deducted as business expense.

6. The record does show that taxpayer constructed buildings on property owned by him, but no sale of any such property appears in the record here. Certainly the construction of buildings by the taxpayer would be an investment, but certainly could not be construed as carrying on a real estate business.

Reply to Other Portions of Respondent's Brief.

In no case does it appear that any property acquired by taxpayer was bought as part of a plan to sell it in the process of carrying on a real estate activity. Every purchase was made under conditions that indicated that the taxpayer would have to wait for growth in the value of the property to get the original investment out of it.

A merchant or dealer does not rely on potential growth for his business. The shoe merchant buys shoes today expecting to sell them next week, or next month in a market where values are probably the same as today. Then he buys more shoes.

In the big purchase of 102 lots from the City taxpayer was confronted with the requirement to pay the City's loss of \$2,000.00 to \$2,500.00, or to buy the lots. [R. 42.] He chose the later in the hope that time would in-

crease the value of the lots and that he might get his money back and make a profit. [R. 82.] The hope was not based on any customers he had or expected to have but on the possibility that there would be a growth in value of the property.

Respondent's brief suggests that the taxpayer kept on hand a substantial inventory of lots and that the supply was constantly replenished, as indicating that the taxpayer was in the business of buying and selling lots. The following is a table showing the number of lots purchased and sold each year, as shown by stipulations appearing on page 14 of the Record. We have added an extra column, computed from the table, which shows the number of lots owned by taxpayer at the end of each year.

<u>Year</u>	<u>Number of Purchases</u>	<u>Number of Parcels Acquired</u>	<u>Number of Sales</u>	<u>Number of Parcels Sold</u>	<u>Number Unsold at End of Year</u>	
1943	2	2	....	....	2	
1944	2	5	....	....	7	
1945	3	69½	....	....	76½	
1946	6	64½	24	38	108	
1947	6	16	8	13	106	
1948	3	9	22	26	89	
1949	1	1	7	15	75	Left on hand at beginning of 1950
1950	1	1	5	11	65	
1951	....	....	8	23	42	
1952	....	....	10	14	28	
	<u>24</u>	<u>168</u>	<u>84</u>	<u>140</u>	<u>—</u>	

This computation effectively refutes the suggestion that taxpayer kept an inventory of lots on hand. In this connection all of the lots purchased up to and including 1946 were purchased before any sales were made in that year, so that we are entitled to say that of the total of 168 lots

acquired in the 10-year period all but the last 27 were purchased before any lots were sold. Thus before the sales began, in the latter part of 1946, taxpayer had on hand 141 lots. The evidence shows that the 132 lots which constituted the bulk of the lots acquired were purchased at a time when the City of Manhattan Beach had failed to sell them at its auction sales, and The Amaranth Land Company was unable to dispose of its lots and sold twenty-one of them for \$2,400.00, and the Pacific Land and Title Company sold nine of its lots, part of those listed above, for \$575.00.

The Commissioner's brief says that Manhattan Beach was a fast growing city, but that was after these purchases were made. The city was small in 1944-1945 when the guaranty arrangement for 102 lots was entered into. [R. 41.]

The evidence shows that in 1946 people became interested in lots (that was after the war when people engaged in war activities began to get back to civilian life.) [R. 80.] The evidence shows that from this time on there was a brisk demand for lots; that people wanting them were hunting for them by searching the Assessor's records and otherwise, but no such demand for lots existed or was suspected by anyone until after taxpayer had acquired 141 lots purchased by him in 1946 and before. [R. 42.] Of the 168 lots purchased in the ten-year period before the court only 27 were purchased after demand for lots began to appear. The record shows that 132 of the 134 lots bought in 1945-1946 were 102 from the City of Manhattan Beach, 21 from Amaranth Land Co. and 9 from Pacific Land and Title Co. [R. 45, 53.]

The 27 lots bought after 1946 included:

6 lots bought and used for a home;

4 lots bought and used for a subsequent home. [R. 21-24.]

6 lots for parking and waste disposal for lots already owned. [R. 61-62.]

2 lots bought, improved and still owned as an investment. [R. 64.]

1 taken in payment of a debt. [R. 64.]

2 bought from a friend in distress. [R. 64.]

2 parcels constituting 125 acres on a mountainside far removed from Manhattan Beach. [R. 57.]

2 given back by a young married woman who had been a member of taxpayer's household for years, for whom they had been bought as a financial assist. [R. 59-60.]

In the three-year period under consideration petitioner bought one lot, sold 48 lots, had 75 lots at the beginning and 28 lots at the end. (See table.) He made 23 sales in the three years on an average of one in seven weeks.

Petitioner made many installment sales. [See R. 14, 15; stip. 5; R. 88.] This further emphasizes the investment nature of the holdings and sales. He thereby received interest. The real estate investments were transmuted into investments of equal value in the form of interest bearing promissory notes secured by the title of the land sold. Petitioner did not receive cash with which to replenish his stock.

A dealer must sell his merchandise for cash so that he may purchase stock to replace that which is sold. There

were no replacements in this case, simply selling such portions of the original investment as were not improved for permanent income.

Respondent relies heavily on the proposition that the ultimate question is the purpose for which property acquired is held at the time of sale. He argues that because the lots were acquired with the hope of making a profit and were sold for a profit that they were being held for sale. From this he jumps to the conclusion that the sales were to customers in the "ordinary course of taxpayer's trade or business."

A hope when a purchase of property is made that the property may at some later time be sold at a profit will not transmute a long time investment in land into a business of buying and selling real estate, or change a capital transaction into an ordinary business profit or loss. (*Palos Verdes Corp. v. United States*, 9 Cir., 201 F. 2d 256, 258; *Harriss v. Commissioner of Internal Revenue*, 2 Cir., 143 F. 2d 279, 280-281; *Phipps v. Commissioner of Internal Revenue*, 2 Cir., 54 F. 2d 469.)

We submit that if lots were originally acquired as an investment their character as such would not change merely because they were ultimately sold as they had to be at some time or other.

The Record [p. 23] shows that of the 11 lots sold by petitioner in 1950 one was acquired in 1943 (held 7 years); four in 1945 (held 5 years); and six in 1946 (held 4 years); that of the 23 lots sold in 1951 one was acquired in 1945 (held 6 years); 20 in 1946 (held 5 years), and two in 1948 (held 3 years); that of the 14 lots sold in 1952 two were acquired in 1944 (held 8 years); four in 1945 (held 7 years); six in 1946 (held 6

years); one in 1947 (held 5 years), and one in 1949 (held 3 years).

The statute (26 U. S. C., 1952 ed., Sec. 117(j)) by virtue of its six months requirement recognizes that there may be investments even with a holding of property for six months or less. However, in order to be accorded capital gain treatment the holding must be for more than six months.

In petitioners' case, at the time of sale the property was held by him for the same purpose it was held when it was acquired, to-wit, an investment. The fact that purchasers came along and took the property off of his hands does not change these people into customers and the investor into a dealer holding his investments primarily for "sale to customers in ordinary course of business." With respect to the interpretation of the statute, the words and phrases, "trade or business", "ordinary" and "customers" are to be construed in their ordinary and not in an artificially created meaning (*Yunker v. Commissioner*, 6 Cir., 256 F. 2d 130, 133.) To be engaged in the real estate business means to be engaged in that business "in the sense that term usually implies". (*Dillon v. Commissioner*, 8 Cir., 213 F. 2d 218, 220; *Yunker v. Commissioner*, 256 F. 2d 120, 132.) We submit that the mere fact that property is sold, whenever that may be, does not change what has been an investment into a business.

Counsel speaks disparagingly of the testimony that taxpayers were motivated by altruistic, civic and moral purposes in some of the lot acquisitions described in the testimony. Aren't such motives present in a very large part of the country's business today? In this general area thousands of people devote large amounts of time and spend considerable sums of money on projects of

altruistic, civic and moral natures such as schools, churches, chambers of commerce, civic associations, service clubs and various governmental activities. For instance the Metropolitan Water District of Southern California, which has constructed and operated the Colorado River Aqueduct, rated by the American Society of Civil Engineers along with the Panama Canal and such others as one of the seven engineering wonders of the United States, is the product of the labors of many men, including the present Board of Directors, who devoted great amounts of time and money to the creation and development of the idea matured into the district, not one of whom ever received a cent of salary or personal compensation except the satisfaction derived from the community benefit which accrued from their efforts and the opportunity to live in a community whose atmosphere, living and business conditions had been improved by their labors.

Is it too much to believe that a lawyer who had been practicing law in a great city for more than thirty years should spend \$574.00 to buy nine lots, two of which were needed in the promotion of a park in a little city in which he lived; or that he might join with others in an effort to improve the economic condition of his city by helping to get hundreds of lots which had been deeded to the State for non-payment of taxes back on the tax rolls; and that in connection with such a project he might find himself obligated to buy and actually buying 102 lots of those left on the hands of the City after the promotion had failed; or that he in assisting the family of a deceased friend and client might buy 21 unsaleable lots for \$2,400 to help them; or that he might buy two lots to give a financial assist to a young married woman who had been a member of his household from childhood? We think

that thousands of people are making such contributions to others or the general welfare every day. The point here is were the lots acquired as part of the development and prosecution of a real estate business? The fact that no sales were made during the time when the bulk of the property was acquired, and that none were bought for sale when sales were being made would seem to answer that question.

We submit that the ultimate finding of fact of the Tax Court that the lots sold by petitioners were held by them primarily for sale to customers in the ordinary course of trade or business is clearly erroneous, and that the decision based thereon should be reversed.

ROBERT E. AUSTIN and

WENDELL H. DAVIS,

Attorneys for Petitioners.



No. 16101 ✓

United States
Court of Appeals
for the Ninth Circuit

HENRY H. BARRETT,

Appellant,

VS.

IOWA NATIONAL MUTUAL INSURANCE
COMPANY, a corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Montana, Billings Division

FILED

SEP 19 1958

PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Plaintiff:

BROWN, SANDE, SYMMES & FORBES,
200 First National Bank Building,
Billings, Montana.

For Defendant:

COLEMAN, LAMEY & CROWLEY,
516 Electric Building,
P. O. Box 2529,
Billings, Montana.



In the United States District Court for the District
of Montana, Billings Division

Civil No. 108

HENRY H. BARRETT, Plaintiff,

vs.

IOWA NATIONAL MUTUAL INSURANCE
COMPANY, a corporation, Defendant.

COMPLAINT

Plaintiff above named for his complaint herein respectfully alleges:

I.

That at all times herein mentioned plaintiff was and now is a citizen of the State of Montana, domiciled in the City of Billings, Yellowstone County, Montana; and the defendant, Iowa National Mutual Insurance Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Iowa; that the matter in controversy, exclusive of interest and costs, exceeds \$3,000.00.

II.

That on or about November 30, 1953, the plaintiff entered into an agreement in writing with the defendant, a copy of which is attached hereto as Exhibit A and made a part hereof as if set forth in full.

III.

That prior to May 14, 1954, the plaintiff leased

the premises referred to in Exhibit A as 15 North 32nd Street, Billings, Montana, to one Tom Hanlon, doing business under the firm name and style of Hanlon Electric Service Company; one Helen Harvey; one Vernon E. Miller and Mary I. Miller; one Joan Hirst; William M. Stratton and Dorothy Stratton; Robert E. Dosedall and Sophia Dosedall, doing business as Army Surplus Sales Company; William F. Reiner and Edith E. Reiner; and that said named individuals occupied separate portions of the premises referred to as 15 North 32nd Street, Billings, Montana, as separate tenants of the plaintiff in this action, and that they maintained in their separate portions of said premises as aforesaid certain personal property which was owned by the tenants herein referred to.

IV.

That each of said tenants occupied separate portions of the building described as 15 North 32nd Street, each occupant's space being segregated from and apart from the place occupied by the other occupants.

V.

That on or about May 14, 1954, a fire originated in said building and consumed and destroyed the said building and destroyed the personal property owned by each of the tenants as aforesaid, and that said fire originated in that portion of the first floor thereof which was occupied by one William Haas as a tenant of plaintiff, and that said fire progressed from said garage to other portions of

said building occupied by other tenants as aforesaid; that thereafter the tenant Tom Hanlon, d/b/a Hanlon Electric Service Company, filed suit against the plaintiff in the District Court of the Thirteenth Judicial District of the State of Montana in and for the County of Yellowstone to recover from the plaintiff the total sum of \$11,906.96 alleged damages for the destruction of the personal property owned by said Tom Hanlon in the course of said fire; that the tenant Helen Harvey commenced an action in the same court against the plaintiff to recover damages in the the sum of \$2,305.10 for the destruction in the course of said fire of personal property owned by said Helen Harvey; that the tenant William F. Reiner and Edith E. Reiner commenced an action in the same court against the plaintiff to recover damages in the sum of \$6,544.63 for personal property of theirs destroyed in said fire; that the tenants Robert E. Dosdall and Sophia Dosdall, d/b/a Army Surplus Sales Company, commenced an action in the same court against the plaintiff to recover damages in the sum of \$7,945.80 for personal property owned by them destroyed in said fire; that the tenants Vernon E. Miller and Mary I. Miller commenced an action in the same court against the plaintiff to recover damages in the sum of \$4,759.16 for personal property owned by them destroyed in said fire. That the tenants William M. Stratton and Dorothy Stratton commenced an action in the same court against the plaintiff to recover damages in the sum of \$6,145.00; that thereafter the defendant, Iowa National Mu-

tual Insurance Company pursuant to the terms of Exhibit A annexed hereto retained the firm of Coleman, Jameson & Lamey, attorneys at law, to defend said actions for and on behalf of the plaintiff, and that subsequently all of the actions were settled for the total sum of \$5,000, said sum being divided between said plaintiffs; that the defendant, Iowa National Mutual Insurance Company, refused and declined to pay the \$5,000.00 compromise as aforesaid, and that this plaintiff was required to pay and did pay the balance of the compromise sum as aforesaid in the amount of \$4,000.00.

VI.

That plaintiff at all times herein mentioned was and now is ready, able and willing to, and did in fact, perform all of the terms and obligations of Exhibit A on his part to be performed, but that the defendant refused and declined to pay more than \$1,000.00 thereof, disclaiming all liability in excess of \$1,000.00, although under the terms and conditions of said agreement, Exhibit A attached hereto, each claim constituted a separate accident.

Wherefore, plaintiff demands judgment against the defendant in the sum of \$4,000.00 together with interest at the legal rate, and the costs and disbursements of this action.

BROWN, SANDE, SYMMES &
FORBES,

/s/ By CHARLES B. SANDE,
Attorneys for Plaintiff.

[Endorsed]: Filed July 25, 1957.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, and for its answer to plaintiff's complaint, admits, denies and alleges:

I.

Admits the allegations of paragraphs I and II.

II.

Admits and alleges that the premises listed in Exhibit A attached to the complaint as "(2) 15 N. 32nd St., Billings, Mont." consisted of one building in which the first floor was occupied by William Haws, operating a garage, and Tom Hanlon, operating an automobile electrical shop, whereas the second floor contained living apartments occupied by the other individuals named in paragraph III of the complaint. Save as herein qualified, admits the allegations of paragraphs III, IV and V.

III.

Answering paragraph VI, denies that each claim constituted a separate accident, alleges that there was only one fire which consumed the entire building, that such constituted one accident for which under the terms and provisions of the contract, Exhibit A attached to the complaint, the defendant had a potential liability of only \$1,000. Admits that the plaintiff at all times was and now is ready, able and willing to, and did in fact, perform all of the terms and obligations of Exhibit A on his part to be performed, and that the defendant refused and

declined to pay more than \$1,000 for settlement of the claims referred to in the complaint, and disclaimed all liability in excess of \$1,000. Alleges that the defendant at all times herein mentioned was and now is ready, able and willing to, and did in fact, perform all of the terms and obligations of Exhibit A on the part of the defendant to be performed.

Wherefore, having fully answered the complaint, defendant prays that plaintiff take nothing by this action, and that defendant do have and recover its costs and expenses herein incurred.

COLEMAN, LAMEY & CROWLEY,
/s/ By CALE CROWLEY,
A member of the firm,
Attorneys for Defendant.

[Endorsed]: Filed August 29, 1957.

[Title of District Court and Cause.]

STIPULATION AND AGREEMENT WITH RESPECT TO FACTS

It is hereby stipulated and agreed between the parties hereto, acting through their respective counsel of record, that this cause may be submitted to the court for judgment upon those facts alleged in the complaint which are admitted in the answer, and upon the following statements of fact, which the parties hereby agree are all of the facts to be submitted to the court in this action:

1. That on and after November, 1953, plaintiff was the owner in fee of that certain real property described in the complaint, and located at 15 North 32nd Street in Billings, Montana; that on May 14, 1954, the southwest corner of the ground floor of said building was leased or rented to one Tom Hanlon, doing business in said location as Hanlon Electric Service Company, and the balance of the ground floor was leased or rented to E. W. Haws, sometimes known as William Haws, who was doing business in said location as the Haws Garage; that the west half of the second floor of said building was divided into apartments which on said date were leased or rented to the remaining persons named in paragraph III of the complaint.

2. That about 5:20 A.M. on May 14, 1954, an alarm was received by the Fire Department of the City of Billings, Montana, with respect to a fire which had commenced in the said building of the plaintiff located at 15 North 32nd Street, and the Billings Fire Department arrived at said fire within two or three minutes thereafter; that a fire of unknown origin had started on the ground floor in the Haws Garage near the east end of said building, and was rapidly spreading upwards through the roof of said building and westerly through both the ground floor and the second floor, destroying the said building and all its contents; that the Billings Fire Department brought said fire under control so that it no longer spread within one hour after its arrival, and the fire was extinguished within two hours after it arrived.

3. The defendant retained the law firm of Coleman, Jameson & Lamey of Billings, Montana, to defend the plaintiff in each of the separate causes of action for damages brought against plaintiff as a result of said fire, which causes of action are referred to in paragraph VI of the complaint; that plaintiff personally retained the services of the law firm of Brown, Sande & Forbes to join with the law firm of Coleman, Jameson & Lamey, in the defense of each of said damage actions; that trial before a jury commenced in the action started by Helen Harvey; that during the progress of said trial it developed that all said claims against the plaintiff could be settled for a total payment of \$5,000.00; that thereupon the law firm of Brown, Sande & Forbes, acting for and on behalf of the plaintiff, made a demand in writing upon the defendant, true and correct copy of which is attached hereto, marked Exhibit "A", and is, by this reference, made a part hereof; that thereafter, the defendant advised plaintiff that it was the position of defendant that the maximum coverage afforded under the terms of its policy of insurance issued to plaintiff, copy of which is attached to the complaint, was \$1,000.00 for all claims arising out of the said fire of May 14, 1954, and that defendant was willing to contribute that full sum to effect such settlements; that thereafter the plaintiff contributed \$4,000.00, and the defendant contributed \$1,000.00 and the said sum of \$5,000.00 was paid to all said claimants, and in return for said payment of \$5,000.00, agreements in writing were obtained

from all claimants releasing and discharging the plaintiff from any and all liability to said claimants, and orders of court were obtained dismissing each and all of said actions for damages with prejudice; that plaintiff has at all times maintained that the maximum coverage for plaintiff under said policy of insurance for all damages arising out of said fire was and is the sum of \$10,000.00; that defendant has at all times maintained that the maximum coverage for plaintiff for all damages arising out of said fire under the terms and provisions of said policy was and is the sum of \$1,000.00; that defendant has at all times refused and declined to reimburse the plaintiff for the said sum of \$4,000.00 personally contributed by the plaintiff towards said settlement, and now refuses to pay to plaintiff the said \$4,000.00, or any part thereof.

Dated this 18th day of September, 1957.

BROWN, SANDE, SYMMES
& FORBES,

/s/ By CHARLES B. SANDE,
Attorneys for Plaintiff.

COLEMAN, LAMEY & CROWLEY,
/s/ By CALE CROWLEY,
Attorneys for Defendant.

EXHIBIT "A"

[Letterhead of Brown, Davis & Sande.]

February 29, 1956

Iowa National Mutual Insurance Company
c/o Coleman, Jameson & Lamey, their attorneys
Billings, Montana
Attention: Mr. Cale Crowley

Re: Policy No. 661171, Henry H. Barrett

Gentlemen:

You are hereby advised that the firm of Mouat & Overfelt, who represent the following plaintiffs:

Helen Harvey, claim in amount of \$2,305.10;

Joanne Hurst, claim in amount of \$3,071.22;

William F. Reiner and Edith E. Reiner, claim in amount of \$6,544.63;

William M. Stratton and Dorothy Stratton, claim in amount of \$6,145.00;

Vernon E. Miller and Mary Ina Miller, claim in amount of \$4,759.16;

Tom Hanlon, claim in amount of \$11,906.96;

Robert E. Dossdall and Sophia Dossdall, claim in amount of \$7,945.80;

in actions against Henry H. Barrett, have tendered an offer of settlement of all of the pending cases and also including two claims wherein formal pleadings have not been filed for the total sum of \$5,000.00.

It is the position of Mr. Barrett that under your policy as above designated coverage is afforded to him sufficient to settle all the claims. Demand is

Exhibit "A"—(Continued)

therefore made that the offer of Mouat & Overfelt be accepted, and that settlement of said suits and claims be made. And upon your refusal, you are hereby notified that Mr. Barrett shall hold you responsible for any damages that he might incur by your failure to accept said settlement.

Further, in the event the above offer is not accepted by you and settlement effected, Mr. Barrett makes demand that the extent of your coverage which you claim is the amount of \$1,000.00 be paid in said offer, in which event Mr. Barrett shall pay the balance in the amount of \$4,000.00 and shall look to you for reimbursement under the provisions of the above policy.

As you realize, the total of the above claims amounts to \$42,677.87, and for your information the trial of the first suit, to wit, Helen Harvey v. Henry H. Barrett, is entering its fourth day. It is now clearly evident that with the evidence that has been admitted by the court, the chance for a verdict in favor of Mr. Barrett is exceedingly slim. Therefore, if settlement is not made at this time as per the plaintiffs' offer, it is very possible that Mr. Barrett will incur judgments totaling a large sum of money.

Yours very truly,

/s/ CHARLES B. SANDE.

CBS:hg

[Endorsed]: Filed January 14, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above case having been submitted to the Court upon the pleadings and upon a stipulation and agreement with respect to facts, and briefs having been submitted by the plaintiff and defendant, and the Court having considered the pleadings, stipulation and agreement and briefs, and being fully advised in the premises, now makes and orders filed its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

The Court adopts as its Findings of Fact all of the facts alleged in the complaint which are admitted in the answer and all of the facts contained in the stipulation and agreement with respect to facts on file herein.

From the foregoing Findings of Fact the Court draws the following

Conclusions of Law

I.

That this Court has jurisdiction hereof.

II.

That the fire which occurred on May 14, 1954, constituted a single accident within the meaning of the insurance policy which is attached as Exhibit A to the complaint.

III.

That the limit of defendant's liability under said policy as a result of the fire which occurred on May 14, 1954, is \$1000.00.

Let Judgment be entered accordingly, and counsel for the defendant is directed to prepare a form of judgment in accordance with Rule 11(b) of the Rules of Procedure of this court.

Done and dated this 25th day of April, 1958.

/s/ W. D. MURRAY,
United States District Judge.

[Endorsed]: Filed April 25, 1958.

In the District Court of the United States,
District of Montana, Billings Division

Civil No. 108

HENRY H. BARRETT, Plaintiff,

vs.

IOWA NATIONAL MUTUAL INSURANCE
COMPANY, a corporation, Defendant.

JUDGMENT

The above entitled action having duly come on for trial before the Court sitting without a jury, upon an agreed statement of facts supplementing those facts alleged in the complaint, and admitted in the answer, and briefs having been submitted to the Court by the plaintiff and the defendant, and

the court having been fully advised in the premises through the pleadings, agreed statement of facts, and briefs, and the court having made herein its findings of fact and conclusions of law,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that plaintiff take nothing and that this action be dismissed on the merits, and that defendant recover from plaintiff its costs herein incurred.

Dated this 30th day of April, 1958.

/s/ W. D. MURRAY,
United States District Judge.

[Endorsed]: Filed and Entered May 1, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Iowa National Mutual Insurance Company, a corporation, Defendant, and to Coleman, Lamey & Crowley, 500 Electric Building, Billings, Montana, Attorneys for Defendant:

Sirs:

Notice Is Hereby Given that plaintiff, Henry H. Barrett, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order of the Honorable W. D. Murray, United States District Judge for the District of Montana, dated April 25, 1958, rendering judgment in favor of the defendant, which judgment was entered on May 1, 1958, and from each and every interlocutory order reviewable by the Court of Appeals which was en-

tered prior to the entry of the final order herein-
above more specifically referred to.

Dated this 25th day of May, 1958.

BROWN, SANDE, SYMMES
& FORBES,

/s/ By WEYMOUTH D. SYMMES,
Attorneys for Plaintiff,

Acknowledgment of Service Attached.

[Endorsed]: Filed May 26, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, Dean O. Wood, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed papers are the originals filed in Civil Cause No. 108, entitled Henry H. Barrett, Plaintiff, vs. Iowa National Mutual Insurance Company, a corporation, Defendant, and designated by the plaintiff as the record on appeal in said cause (no designation being filed by the defendant);

Witness my hand and the seal of said Court at Billings, Montana, this 9th day of July, 1958.

[Seal] DEAN O. WOOD,
Clerk,

/s/ By JOAN E. KUDE,
Deputy Clerk.

[Endorsed]: No. 16101. United States Court of Appeals for the Ninth Circuit. Henry H. Barrett, Appellant, vs. Iowa National Mutual Insurance Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana, Billings Division.

Filed: July 12, 1958.

Docketed: July 19, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 16101

HENRY H. BARRETT,

Appellant,

vs.

IOWA NATIONAL MUTUAL INSURANCE
COMPANY, a corporation,

Appellee.

STIPULATION

It is hereby stipulated, consented to and agreed by and between the attorneys for the respective parties hereto that the exhibits attached to the Complaint herein need not be printed in the Transcript on Appeal, and that these exhibits may be

considered in their original form by this Court on the appeal; and that attached hereto as Exhibit A and made a part hereof as if set forth in full is the insurance policy, a copy of which is attached to the Complaint as Exhibit A, and that the attached policy may be considered by the Court of Appeals upon appeal.

Dated this 17th day of July, 1958.

BROWN, SANDE, SYMMES &
FORBES,

/s/ By WEYMOUTH D. SYMMES,
Attorneys for Appellant.

COLEMAN, LAMEY & CROWLEY,

/s/ By CALE CROWLEY,
Attorneys for Appellee.

[Endorsed]: Filed July 21, 1958. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS
ON APPEAL

1. The Court erred in its Conclusion of Law numbered II.

2. The Court erred in its Conclusion of Law numbered III.

3. The Court erred in directing the entry of judgment in favor of the defendant and against plaintiff.

4. The Court erred in entering the judgment in favor of the defendant and against the plaintiff.

Dated this 25th day of July, 1958.

BROWN, SANDE, SYMMES &
FORBES,

/s/ By WEYMOUTH D. SYMMES,
Attorneys for Plaintiff and
Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 28, 1958. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

To the Clerk of the United States Court of Appeals for the Ninth Circuit and to Coleman, Lamey & Crowley, Attorneys for the Defendant and Appellee in the Above Entitled Action:

Sirs:

Please take notice that pursuant to Rule 75 of the Federal Rules of Civil Procedure, the undersigned attorneys for the plaintiff and appellant in the above entitled action hereby designate the following documents to be included in the record on appeal in this case:

1. The original Complaint, except the exhibits attached to said Complaint.

2. The defendant's Answer.
3. The stipulated facts in the case.
4. The Order and Judgment.
5. The Findings of Fact and Conclusions of Law dated April 25, 1958.

Dated this 25th day of July, 1958.

BROWN, SANDE, SYMMES &
FORBES,

/s/ By WEYMOUTH D. SYMMES,
Attorneys for Plaintiff and
Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed July 28, 1958. Paul P.
O'Brien, Clerk.



United States Court of Appeals

For the Ninth Circuit

HENRY H. BARRETT,

Appellant,

v.

IOWA NATIONAL MUTUAL INSURANCE
COMPANY, a corporation,

Appellee.

Appellant's Brief

Appeal from the United States District Court for the
District of Montana.

BROWN, SANDE, SYMMES & FORBES
Attorneys at Law

WEYMOUTH D. SYMMES, of Counsel
Attorneys for Appellant.

Suite 200, First National Bank Bldg.
Billings, Montana



United States Court of Appeals

For the Ninth Circuit

HENRY H. BARRETT,

Appellant,

v.

IOWA NATIONAL MUTUAL INSURANCE
COMPANY, a corporation,

Appellee.

Appellant's Brief

Appeal from the United States District Court for the
District of Montana.

BROWN, SANDE, SYMMES & FORBES
Attorneys at Law

WEYMOUTH D. SYMMES, of Counsel
Attorneys for Appellant.

Suite 200, First National Bank Bldg.
Billings, Montana



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United States Court of Appeals

For the Ninth Circuit

HENRY H. BARRETT,

Appellant,

v.

IOWA NATIONAL MUTUAL INSURANCE
COMPANY, a corporation,

Appellee.

Appellant's Brief

Appeal from the United States District Court for the
District of Montana.

I. JURISDICTION

This case was tried before District Judge W. D. Murray, sitting without a jury, on stipulated facts. The District Judge entered a final judgment in favor of the defendant and against the plaintiff (R. 15). Plaintiff is a citizen and resident of Montana (R. 3); defendant is a foreign mutual insurance corporation organized under the laws of Iowa (R. 3). The amount in controversy exclusive of interest and costs exceeds \$3,000.00. The

United States District Court had jurisdiction under Title 28, Section 1332, United States Code,* and this Court has appellate jurisdiction under Title 28, Section 1291, United States Code.

II.

STATEMENT OF THE CASE

The facts in this case are not in dispute. On November 30, 1953, the plaintiff was the owner of a building located at 15 North 32nd Street, Billings, Montana, and he leased separate portions of said building to seven separate tenants (R. 8). On that date a policy of insurance written by the defendant was issued to plaintiff, the original of which has been submitted to this court pursuant to stipulation of counsel. The policy period was from November 30, 1953, to November 30, 1954.

So far as this case is concerned, the material part of this policy is "Coverage C" of Item 3 on the first page of the policy. For convenience, that portion of the policy is as follows:

"COVERAGES	LIMITS OF LIABILITY
C Property Damage Liability—Except Automobile	\$ 1,000.00 each accident
	10,000.00 aggregate operations
	10,000.00 aggregate protective
	Excluded aggregate products
	10,000.00 aggregate contractual"

On May 14, 1954, a fire commenced in the building, starting in a tenant's garage, and thereafter progressing

* This appeal was taken prior to the 1958 Amendment increasing the jurisdictional amount from \$3,000.00 to \$10,000.00.

from point to point throughout the building, finally becoming extinguished about two hours after the fire started (R. 9). As a consequence, several actions were commenced against the plaintiff by his various tenants to recover for the loss of property in the fire (R. 10). Ultimately, all of these actions were settled for the total sum of \$5,000.00, no more than \$1,000.00 being paid to any one claimant (R. 11). The defendant, Iowa National Mutual Insurance Company, claimed it was, under its policy, liable only to pay \$1,000.00 of this total settlement and the plaintiff must absorb the loss over and above that \$1,000.00, to-wit, \$4,000.00, and plaintiff paid this loss. The instant action is to recover that sum from defendant.

III.

THE QUESTION PRESENTED

The basic question to be determined in this case is the meaning of the use of the phrase "each accident" in Coverage C, as modified by the phrases "\$10,000.00 aggregate protective" and "\$10,000.00 aggregate contractual." There is, admittedly, a division of authority on the problem presented by this appeal. The question to be decided has been aptly put by the annotator in a recent annotation in *American Law Reports* in 55 A.L.R. 2d, p. 1303:

"In construing the 'per accident' clause, all the courts base their decisions on an application of the same general rules of construction. The different results they reach under these rules are brought about by the fact that some courts consider the clause, and particularly the terms 'accident' and 'occurrence,' as ambiguous, while other courts consider the clause as couched in plain and unambiguous terms.

“On the basis of the above analysis, one would come to the conclusion that while the courts have reached different results in individual cases, there is no split of authority as far as legal theory is concerned. Such a conclusion, however, while literally correct, overlooks the difference in what may be called the philosophical approach taken by the courts in construing the ‘per accident’ clause, which approach forms the true reason of their decisions. Underlying all the decisions there is a single basic issue of a philosophical nature, namely, whether the term ‘accident’ as used in the ‘per accident’ clause refers to the cause or to the result of the event insured against. Stated differently, the question is whether the ‘per accident’ clause should be construed as providing for a maximum of liability resulting from one proximate cause or as applying to the result to the injured persons protection against whole claims is the subject of the insurance.”

Significantly, none of the cases supporting defendant have considered the impact on the contract of the misleading phrases “aggregate protective” and “aggregate contractual.” We submit, *arguendo*, that if the phrase “each accident” is, by itself, free from ambiguity, it is made ambiguous by these modifying phrases. The presence or absence of these phrases may be a sound basis for reconciling the conflicting cases which have considered the problem at bar.

IV.

SPECIFICATIONS OF ERROR

1. The Court erred in its Conclusion of Law numbered II (R. 14).
2. The Court erred in its Conclusion of Law numbered III (R. 15).

3. The Court erred in directing the entry of judgment in favor of the defendant and against the plaintiff.

4. The Court erred in entering the judgment in favor of the defendant and against the plaintiff.

V.

ARGUMENT

A. MONTANA LAW

The rule is settled in Montana that the construction of an insurance contract is governed by the law of the state where the contract is executed. As appears on the face of the policy under consideration, it was executed in Montana. The Supreme Court of Montana has held in *Capital Finance Corporation v. Metropolitan Life Insurance Company*, 243 Pac. 1061, 75 Mont. 460, that an insurance contract made in Montana is governed by Montana law. Likewise, *Section 13-712, Revised Codes of Montana, 1947*, provides as follows:

“Law of place. A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.”

In the case at bar the insurance contract under consideration was not only made in Montana, but was to be performed in Montana. There are no Montana cases precisely deciding the question to be decided by this Court in the case at bar. There are, however, cases that point to the conclusion that Montana would construe the “each accident” clause as applying to the result to the injured person rather than the cause.

The rule is settled in Montana that:

1. A contract of insurance must be drawn with such precision that it will be free from ambiguity, require no construction, but construe itself; otherwise all doubts are to be resolved in favor of the insured. *Montana Auto Finance Corp. v. British & Federal Fire Underwriters*, 232 Pac. 198, 72 Mont. 69.

2. A policy of insurance is to be liberally construed in favor of the insured and strictly construed against the insurer. *Dalbey v. Equitable Life Assurance Society of the United States*, 74 Pac. 2d 432, 105 Mont. 587; *Johnson v. Metropolitan Life Insurance Company*, 83 Pac. 2d 922, 107 Mont. 133; *Aleksich v. Mutual Benefit Health & Accident Ass'n.*, 164 Pac. 2d 372, 118 Mont. 223, 162 A.L.R. 263.

3. Where language of a policy is ambiguous and susceptible to two different constructions, it will be strictly construed against the insurer and that construction adopted which is most favorable to the insured. *Park Saddle Horse Company v. Royal Indemnity Company*, 261 Pac. 880, 81 Mont. 99.

The reasons for these rules are cogently stated in *Montana Auto Finance Corporation v. British & Federal Underwriters*, 232 Pac. 198, 72 Mont. 69, at page 75:

"It is a matter of common knowledge that insurance companies prepare their own contracts of insurance. The language of the policy is their language. They do not permit the insured to have a voice in the drawing of his own contract; nor does he negotiate with reference to its terms in the sense that negotiations are carried on before agreements are reached in ordinary contracts. *** Policies of insurance are invariably complex and understood by laymen with difficulty, and as a result the insured generally makes a request for the kind of insurance he desires, then signs 'on the dotted line' upon a formidable appearing printed form with the provisions of which the

average insured has slight, if any, acquaintance. *The policies are prepared by skilled lawyers retained by the insurance companies, who through years of study and practice have become experts upon insurance law, and are fully capable of drawing a contract which will restrict the scope of the liability of the company with such clearness that the policy will be free from ambiguity, require no construction, but construe itself.*" (Emphasis supplied)

An average individual, in an over-the-counter purchase of an insurance policy, certainly would not indulge, for example, in the polemics of the author of the annotation in 55 A.L.R. 2d 1303, *supra*. He would not be concerned with the different philosophical approaches of the various courts and speculate whether the "per accident" clause meant "cause" or "effect." He would assume, and rightly so, that he was buying protection up to \$10,000.00 "aggregate protective" for multiple claims. Otherwise, the latter phrase is meaningless. This is especially so in situations where the insurance purchased, as here, was to protect plaintiff from possible claims of seven different tenants. If the insurer had a different intent, it should say so "with such clearness that the policy will be free from ambiguity, require no construction, but construe itself." To hold otherwise would ignore Montana cases which require policies upon which the public relies for protection to be written free from fine distinctions which few can understand until pointed out by lawyers or judges. The fact that the word "accident" is ambiguous is pointed out by the New York Court of

Appeals in *Burr v. Commercial Travelers Mutual*, 295 N. Y. 294, 67 N.E. 2d 248, 166 A.L.R. 462:

"Legal scholars have spent much effort in attempts to evolve a sound theory of causation and to explain the nature of an 'accident.' Philosophers and lexicographers have attempted definition with results which have been productive of immediate criticism. No doubt the average man would find himself at a loss if asked to formulate a written definition of the word. Certainly he would say that the term applied only to an unusual and extraordinary happening; that it must be the result of chance; that the cause must be unanticipated or, if known, the result must be unexpected."

B. AUTHORITIES FROM OTHER JURISDICTIONS

At the time the policy before this Court was written, on November 30, 1953, the only definitive case precisely deciding the question at bar which the skilled lawyers who write these policies had before them to guide them was *Anchor Casualty Co. v. McCaleb*, 178 Fed. 2d 322 (C. A. 5th, 1948). In *Anchor*, the insured formed a mining partnership, by the terms of which certain drilling operations were to be conducted upon lands leased by the insured from third parties. A policy of insurance was issued to them by the Anchor Casualty Company which limited liability caused by "each accident" to "\$5,000.00," with "aggregate contractual" liability limited to \$25,000.00. While the policy was in full force and effect, an oil well which the insured was drilling blew in and caused considerable quantities of oil, gas, distillate, sand and mud to be carried by the wind onto property of land

owners and tenants in the immediate area, with resulting damage to property. A number of actions were filed by the land owners aggregating \$35,000.00. The Anchor Casualty Company brought the action for a declaratory judgment that the total liability of Anchor Casualty Company under the terms of the policy was \$5,000.00 because this constituted only one accident within the meaning of the policy. The Court in refusing to say this was one accident held in favor of the defendant, stating (p. 324):

“Appellant’s total liability for property damage under the policy is not measured by the limit of \$5000 stated in the policy under coverage ‘b’ for each accident, but by the limit of \$25,000 stated for aggregate damage. The blowing-out of the well was not a single accident but a series of events, a catastrophe. Numerous accidents were the product of this motivating force and the wind a supervening force. The eruptions continued intermittently for over two days; and during this period the wind changed from time to time, blowing mud and sand on different properties. *The wording ‘each accident,’ as used in the policy, must be construed from the point of view of the person whose property was injured. In Bouvier’s Law Dictionary, an accident is defined as an event which, in the circumstances, ‘is unusual and unexpected by the person to whom it happens.’ When the separate property of each claimant was damaged, an accident occurred to the property of each owner. If one cause operates upon several at one time, it cannot be regarded as a single incident, but the injury to each individual is a separate accident. Couch, Cyclopaedia of Insurance Law, Vol 5, page 4136.*

“ *** *We think the term ‘aggregate’ was meant to serve as a total limit of damage to property of different persons from a closely related series of events, such as were evident in this case.*” (Emphasis supplied).

See also: *South Staffordshire Tramways Company, Ltd. v. The Sickness & Accident Assurance Association, Ltd.*, 1 Q.B. 402 (1891), which held in substance that the word "accident" meant the "mischief suffered by a person injured to his person or property."

Denham v. LaSalle, 168 Fed. 2d 576 (C. A. 7th, 1948), which was relied upon by defendant in the District Court, involved the construction of a phrase in a policy of insurance providing: "For any one occurrence or catastrophe." Obviously there was no room for construction as to whether or not this phrase applied to cause or effect. There the insurer by use of the phrase "occurrence or catastrophe" was careful to eliminate any ambiguity. *Hyer v. Inter-Insurance Exchange*, 246 Pac. 1055, a California case, also relied upon by defendant, involved construction of the following phrase: "But in no case shall the Exchange be liable with respect to *claims* *** arising from one accident." (Emphasis supplied). Here, too, any ambiguity in the policy has been clarified by the use of the plural "claims." Neither the *Denham* case nor the *Hyer* case involved the phrase "aggregate protective" or "aggregate contractual."

Thus here the skilled lawyers who write these policies for insurance companies could easily have obviated the ambiguity that exists in the policy under consideration in the light of the *Anchor* case and inserted in the policy a definition of the phrase "each accident" which would bring it within the rule of *Denham v. LaSalle, supra*, and

Hyer v. Inter-Insurance Exchange, supra. We submit that the failure to do so in the light of the *Anchor case* compels a judgment in favor of the appellant in the case at bar. Interestingly enough, on July 6, 1955, a new standard policy was adopted. Elliott C. Fenton, Esq. discusses the new standard policy in "the Independent Adjuster," Volume 21, No. 3, September, 1956, and points out that the chaotic conditions created by the conflicting decisions of the Fifth Circuit in *Anchor Casualty Company v. McCaleb*, 178 Fed. 2d 322, and *St. Paul Mercury Indemnity Company v. Rutland*, 225 Fed. 2d 689, which we will discuss later, are eliminated in the new policy because the new policy provides:

"4. Limit of Liability—Coverage B: The limit of property damage liability stated in the declaration as applicable to 'each accident' is the total limit of the company's liability for damages arising out of injury to or destruction of all property of one or more persons or organizations, including the loss of use thereof, as the result of any one accident."

See: 1 Defense Law Journal 368 (1957).

In 1955, after the policy at bar was written, and after the loss at bar, the same problem again came before the Court of Appeals for the Fifth Circuit in *St. Paul Mercury Indemnity Company v. Rutland*, 225 Fed. 2d 689. There the Court in substance, if not specifically, overruled the *Anchor case*, one judge dissenting. We believe that the dissenting Judge in the *St. Paul Mercury Indemnity Company case* correctly defined the rule that should be applied in the case at bar. In any event, this case

did not consider the modifying phrase "aggregate protective." Moreover, events immediately preceding the decision of the majority in the *St. Paul* case are revealing and interesting. The appeal was originally submitted before a panel of judges of the Fifth Circuit consisting of Judges Holmes, Borah and Tuttle. They filed an opinion, one Judge dissenting, sustaining the decision of the District Court which had followed the *Anchor* case, *supra*. Before that opinion became effective, it was withdrawn and the appeal was placed upon a rehearing docket before a new panel of judges consisting of Judges Rives, Cameron and Dawkins. By a divided Court they reversed the decision of the District Court and held in substance that the term "each accident" referred to cause, not effect. Although the majority attempted to distinguish the *Anchor* case, a reading of the majority opinion will reveal that in fact the distinction is without merit as pointed out by Judge Cameron in his dissenting opinion. We urge the Court to study the dissenting opinion of Judge Cameron, and we are convinced that the reasoning he applied should be applied to the case at bar in view of the Montana authorities referred to above.

Moreover, when we consider the number of judges who participated in writing the opinion in *Anchor* and the two opinions in *St. Paul Mercury Indemnity*, the fact is that five judges of the Court of Appeals for the Fifth Circuit have held that the term "each accident" refers to effect, while three judges of that Court have held that the term "each accident" refers to cause. The divergence

of views of the judges emphasizes and reemphasizes the fact that there is an ambiguity which should be resolved in favor of the insured.

In XIX Georgia Bar Journal 377, there is a critical note on the decision of the Fifth Circuit in the *St. Paul Mercury Indemnity Company* case. It is there stated:

"In the present case, the general standard to the effect that 'ambiguities shall be resolved in favor of the insured' seemed tailor-made for the occasion and would normally have been applied. *Atlas Assurance Co. Ltd. v. Lies*, 70 Ga. App. 162, 27 S.E. 2d 791 (1943). This would have resulted, as it did in the first opinion by the court, in construing the word 'accident' not in a causal sense or as an event, but from the viewpoint of the damage to third persons, which would have made 15 separate accidents. *Anchor Casualty Co. v. McCaleb*, 178 F. 2d 322 (5th Cir. 1949). The court, however, deemed the occasion one for special effort, and after paying lip-service to the general standards, adopted two techniques which enabled it to construe the word 'accident' as casual only, and to hold against the plaintiff. The first was to give importance to the fiscal consideration of the insurer, and to decide that insurance was sold in exchange for a premium, and that the premium was a rating device that reflected an area of liability; and that no company, at the rate here charged, would assume unlimited liability. Insurance Law Journal No. 384-395, p. 788-790 (1955). The second one was to find that after all there was no ambiguity in the language of the policy and hence the only job of the court was to give to the words employed their 'popular, every day normal meaning.' *Hulsey v. Interstate Life & Acc. Ins. Co.*, 207 Ga. 167, 60 S.E. 2d 353 (1950). Neither of the court's propositions has much to do with the case. The first one displays a tenderness for insurers that seems out of place and seems to overlook completely the fact that plaintiff's construction of the

language, though sufficient to enable recovery here, still contained reasonable limits on liability. The second one may be classed as a sort of subsidiary general standard, but if its use is limited to situations where ambiguities do not exist, it should have no application to the language involved. Moreover, to take a technical word such as 'accident' whose meaning has been the object of legal interpretation for centuries, and attempt to give it a popular meaning, is probably pleasant and rewarding if played as a parlor game, but rather unfortunate if made an ultimate in the judicial process.

"After exploring the two techniques and concluding from them that the insurer's meaning of accident was correct, the court examined available precedents to determine if its decision was 'in line.' *South Staffordshire Tramways Co., Ltd. v. The Sickness & Acc. Assurance Assn., Ltd.*, 1 Q.B. 402 (1891). *Anchor Casualty Co. v. McCaleb*, supra; *Hyer v. Inter-Ins. Exchange*, 246 P. 1055 (C. A. 1926); *Tri State Roofing Co. v. New Amsterdam Casualty Co.*, 139 F. Supp. 193 (W. D. Penn. 1955); *Kuhn's of Brownsville, Inc. v. Bituminous Cas. Co.*, 270 S.W. 2d 358 (Tenn. 1954); *Denham v. LaSalle-Madison Hotel Co.*, 168 F. 2d 576 (7th Cir. 1948). It found of course that there was ample authority for either viewpoint, and hence with stare decisis out of the way, the court decided that its power of choice was unlimited.

"Incidentally, in each of the cases examined by the court, the policy in question contained, in addition to the ambiguous language about property damage, a precise and succinct provision dealing with limitations in liability for personal injuries. This raises the question as to why the insurer should exercise every precaution to be clear and concise in regard to one type of damage, whenever in regard to property caution was abandoned and no effort was made at clarity. The only possible inference from this seems to be that the insurer, who selects the words and writes the policies, was leaving property damage to the way-

ward winds of chance, and when this is done the only reasonable interpretation is one that favors the contention of the plaintiff."

The question before this Court in the case at bar again arose in *Truck Insurance Exchange v. Rohde*, 303 Pac. 2d 659, 41 Wash. 2d 465, 55 A.L.R. 2d 1288. There, by a five to three opinion, the Court held that the term "each accident" referred to cause and not to effect, relying primarily upon the *St. Paul Mercury Indemnity* case. In the annotation that follows that case in 55 A.L.R. 2d at page 1304, there is an effort on the part of the annotator to reconcile the conflicting cases which we have considered. There the annotator states:

"If, on the basis of the present cases, an attempt is made to reconcile the decisions regardless of the rationes decidendi advanced in the respective opinions—simply on the facts presented—such a reconciliation can be achieved on the basis of the closeness of connection in time and space between the individual items of injury or damage. If cause and result are simultaneous or so closely linked in time and space as to be considered by the average person as one event, the courts have invariably found that a single accident within the meaning of the accident clause of the policy has occurred, while if enough time has elapsed between the injuries or damages to the various items involved or if the latter are widely separated in space, the courts have been inclined to allow separate claims even though they sprang from the same cause. Generally speaking, it may therefore be stated that the aggregate of events resulting from insured's negligent act, such as several collisions, constitutes one accident, provided there is a close connection in time and place and a single sequence of cause and effect embracing the entire aggregate of events. If, on the other hand, the times or places and detailed causes of each instance

of injury or damage are different, there are separate accidents although each contains a common causal factor. This test, by necessity, does not suggest a fixed and arbitrary rule of a certain 'permissible' time interval or difference in location. It does not attempt to answer in the abstract how much time must elapse or how far apart the items must be in space before the courts will recognize the existence of separate accidents. All this test can do is to point out the relevant factors which in the past seem to have influenced the courts, at least unconsciously, in reaching their decisions.

"We know at present that a few seconds, which was the interval of time in *Truck Ins. Exchange v. Rohde* (1956), 49 Wash. 2d 465, 303 P. 2d 659, 55 A.L.R. 2d 1288, is not enough, and we know, on the other hand, *that an interval of several hours*, as was involved in *Anchor Casualty Co. v. McCaleb* (1949), CA 5th (Tex.) 178 F. 2d 322, and *Kuhn's of Brownville, Inc. v. Bituminous Casualty Co.* (1954), 197 Tenn. 60, 270 SW 2d 358, is enough. It is easy to imagine situations in which, for instance, several minutes may elapse between the injury or damage to the various persons or properties involved, and which the probabilities are in favor of assuming that the courts will go very far in holding that only one accident occurred, such result is by no means certain. It must not be forgotten that the longer the time interval, the weaker the proximate cause concept and the easier the finding of intervening causes. Substantial physical separation in space of the injured persons or damaged properties seems an even stronger factor in favor of judicial recognition of separate accidents, although there is no case specifically referring to this factor.

"In deciding the issue with which the present annotation is concerned, the courts have to grapple with problems of semantics as well as philosophical concepts. There obviously is no easy way out of a troublesome situation, but it is submitted that the application of the suggested test, while probably not satisfy-

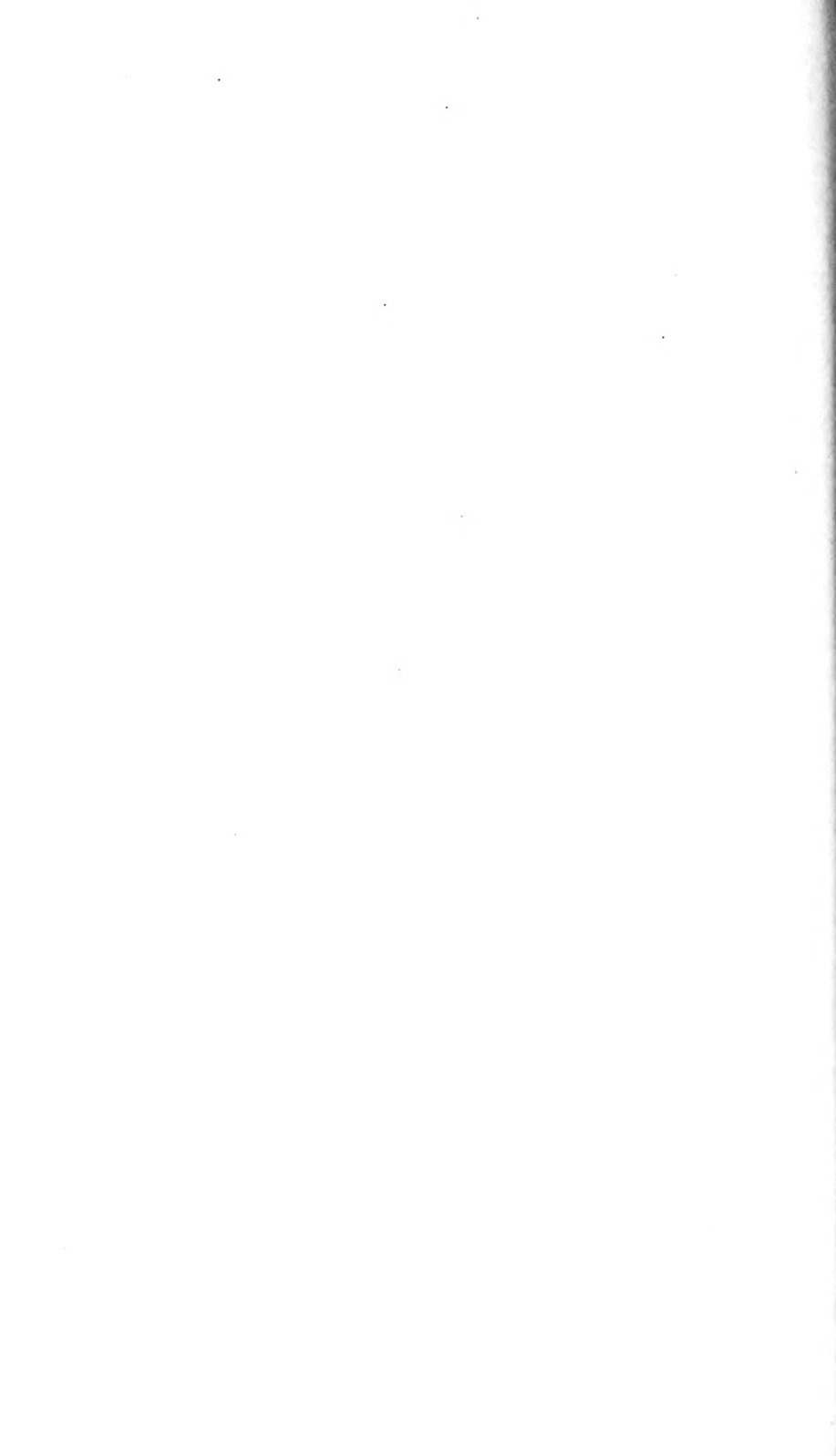
ing those who insist on strict logic, may achieve results which will be regarded as 'just' by more people than any other solution thus far advanced. *It is, of course, obvious that a more precise drafting of the applicable liability policy provisions would go a long way in obviating the problem.*" (Emphasis supplied).

If we apply this effort of reconciliation to the case at bar, then in such event judgment should be entered for the appellant, because the losses in question occurred over a period of time and were not instantaneous as in the cases of *St. Paul Mercury Indemnity Company* and *Truck Insurance Exchange*. Accordingly, we respectfully submit that judgment should be entered in favor of the appellant in this case.

Respectfully submitted,

BROWN, SANDE, SYMMES
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United States Court of Appeals

For the Ninth Circuit

HENRY H. BARRETT,

Appellant,

vs.

IOWA NATIONAL MUTUAL INSURANCE
COMPANY, a corporation,

Appellee.

Brief of Appellee

COLEMAN, LAMEY & CROWLEY
Attorneys for Appellee

BROWN, SANDE, SYMMES & FORBES
Attorneys for Appellant

FILED

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PAUL P. O'BRIEN, CLERK



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United States Court of Appeals

For the Ninth Circuit

HENRY H. BARRETT,

Appellant,

vs.

IOWA NATIONAL MUTUAL INSURANCE
COMPANY, a corporation,

Appellee.

Brief of Appellee

STATEMENT OF ISSUE INVOLVED

A single, sudden, unintentional, uninterrupted, continuous fire completely destroyed the Barrett Building within two hours from the time it commenced. Property owned by several different tenants was destroyed in the one fire. The several tenants commenced tort actions for damages against the appellant, and the several claims were settled for a total payment of \$5,000.00, of which sum appellant paid \$4,000.00 and appellee paid \$1,000.00. Appellant alleges, and appellee denies, that under its policy of insurance the appellee was obligated to pay the

full sum of \$5,000.00. We submit that the true issue involved in this case is:

Is the policy limit for all property damage sustained in a single, uninterrupted, continuous fire, resulting from alleged negligence of the appellant governed by the limit specified in the declarations of "\$1,000.00 for each accident"; or is the limit of "\$1,000.00 for each accident" a limit of "\$1,000.00 for each person sustaining damages in the single fire"?

Appellant makes the same claim made in the litigated cases that if all the property destroyed were owned by one tenant, there would be no question involved, there would then be one accident and the policy limit would be \$1,000.00, but that since several tenants were involved, there was more than one accident, and the limit is \$1,000.-00 for each person damaged, rather than \$1,000.00 for each accident. The weight of authority refutes appellant's contention.

We agree with the statement in appellant's brief that there are no controlling Montana decisions. We concede the soundness of the rules of law with respect to ambiguity set out in the Montana cases cited in appellant's brief, but they are not applicable or pertinent to the issue in this case. The same argument was advanced and reviewed in the litigated cases constituting the weight of authority on the issue involved. A late Montana decision expresses the same views with respect to the rule of ambiguity as contained in the case decisions constituting the weight of authority on the issues involved.

We submit that in the absence of controlling deci-

sions in the State of Montana, or by the Ninth Circuit, that this court should give great weight to the construction on Montana law by the trial court, particularly when it does coincide with and represent the weight of authority.

ARGUMENT

The following decisions represent the weight of authority:

St. Paul-Mercury Indemnity Company v. Rutland, 5th C.C., 225 F. (2d) 689; (*Definition of accident reaffirmed in Irby v. Republic Creosoting Co.*, 5th C.C., 228 F. (2d) at 197;

Denham v. LaSalle-Madison Hotel Company, 7th C.C., 168 F. (2d) 576, *certiorari denied* 69 S. Ct. 167;

Tri-State Roofing Company v. New Amsterdam Casualty Company, D.C., W.D. Pennsylvania, 139 F. Supp. 193;

Truck Insurance Exchange v. Rohde, Washington, 303 P. (2d) 659;

Hyer v. Inter-Insurance Exchange, California, 246 Pac. 1055.

In his brief, appellant refers to several Montana cases with respect to the general rule that the law of Montana should be resorted to, to interpret this contract, and that ambiguous contracts of insurance will be construed and doubts resolved in favor of the insured and against the insurer. We have no quarrel with those cases, nor with the rules stated therein. The language in this policy "each accident" is not ambiguous, and the cases cited by the appellant are simply not applicable. In this con-

nection, the Montana Supreme Court said in the case of *James v. Prudential Insurance Company of America*, 312 P. (2d) 125, in a unanimous opinion decided May 22, 1957:

"The plaintiff urges a number of cases to the effect that an uncertain contract should be interpreted most strongly against the party causing the uncertainty. Such is the Montana rule. R.C.M. 1947, Sec. 13-720. But even though it is a cardinal principle of insurance law that a contract of insurance is to be construed liberally in favor of the insured and strictly against the insurer, contracts of insurance should be given a fair and reasonable construction. (Citing case.) In arriving at such construction, no matter how strictly construed against the insurer, the intention of both insurer and insured is to be ascertained from the language of the policy. R.C.M. 1947, Sec. 13-704. Effect must be given to every part of the policy contract. R.C.M. 1947, Sec. 13-707. *The words of the contract are to be understood in their usual meaning.* R.C.M. 1947, Sec. 13-710. Common sense controls." (Emphasis supplied.)

The same basic rules quoted from the *James* case were applied by the California court in the case of *Hyer v. Inter-Insurance Exchange*, by the Washington Court in the case of *Truck Insurance Exchange v. Rohde*, and by the Fifth Circuit Court in the case of *St. Paul-Mercury Indemnity Company v. Rutland*.

In the Washington case, for example, the court stated that the words of the contract which are the basis of the litigation, and the meaning of which the court was required to determine, were "accident" and "occurrence." The court stated that for the purpose of the case the terms

were synonymous, and since they were not defined in the contract:

“ * * * we must determine their popular and ordinary meaning.” (*Pp. 661.*)

After pointing out that the common understanding contemplated that all damages sustained within the confines of a single, continuous, and uninterrupted act constituted a single act or occurrence, the court said:

“We are of the opinion, from reading the contract as a whole, that the language used is not ambiguous, and that the intention of the parties and what they desired to accomplish are clearly expressed therein. The words ‘accident’ and ‘occurrence’ are words of common usage and, in and of themselves, are not ambiguous. An ambiguity will not be read into a contract.” (*Pp. 664.*)

In *St. Paul-Mercury Indemnity Company v. Rutland*, the court said:

“It is true that Georgia also follows the general rule which decrees that all ambiguities in an insurance contract shall be construed most favorably to the assured. However, the words used must be given their usual and ordinary meaning, and we may not strain their construction in order to perceive ambiguities. (Citing cases.)

“The only limit expressed in the policy for automobile property damage liability is the disputed phrase ‘\$5,000.00 each accident.’ It can hardly be denied that when ordinary people speak of an ‘accident’ in the usual sense, they are referring to a single, sudden, unintentional occurrence. They normally use the word ‘accident’ to describe the *event*, no matter how many persons or things are involved.” (*Pp. 691.*)

Our Montana statutes, of course, were adopted from those in California. After stating that the terms used in

an insurance policy should be given their plain, ordinary, and popular meaning, the California court in *Hyer v. Inter-Insurance Exchange*, discussed the meaning of the word "accident" and then said:

"Where, as here, one negligent act or omission is the sole proximate cause, or cause causans, there is, as a general rule, but one accident, even though there be several resultant injuries or losses. Let us suppose that in the instant case the owner of the Overland car had likewise been the owner of the Cadillac, and that the former vehicle had been towing the latter when the successive but casually connected collisions occurred—just as each car in a freight train pulls the car which is immediately behind it. Could it correctly be said in the case just supposed that there were two accidents, merely because two automobiles were damaged in sudden and unexpected crashes happening in continuous sequence as a connected chain of events, but springing from a single initial cause? Clearly not. It would no more be correct to say of such a case that there were two accidents than it would be to predicate two or more accidents on a general freight train wreck, merely because two or more cars in the train might have been demolished in the same catastrophe. If, in our suppositious case, there would be but one accident, though two automobiles belonging to the same person were injured, then how could that accident become two accidents merely because, under the facts of this case, the two injured vehicles were separately operated and owned? To ask the question is to answer it." (*Pp. 1057.*)

In *Tri-State Roofing Company v. New Amsterdam Casualty Company*, the District Judge in the Pennsylvania court had involved the same identical fact situation as we have in this Barrett case. The same policy provisions were likewise involved. Initially, on the strength

of the first opinion in *St. Paul-Mercury Indemnity Company v. Rutland*, the court held as now contended by appellant in this case. On rehearing, the court said:

"Subsequently, on April 26, 1955, counsel for defendant filed a motion to amend or set aside the opinion and for a rehearing. The opinion of this court was referred to wherein a decision of the Court of Appeals for the Fifth Circuit, *Saint Paul-Mercury Indemnity Co. v. Rutland*, decided December 15, 1954, No. 15184, was cited. Defendant recited the fact that on March 22, 1955 the Court of Appeals for the Fifth Circuit granted a rehearing. As this court had relied on the foregoing decision, which was favorable to the plaintiff in this case, an order was entered on May 12, 1955 by this court staying all proceedings and continuing this case generally, as this court desired to have at the final argument, the benefit of the final decision of the Court of Appeals in the case mentioned. The final decision in that case was filed on August 24, 1955, 225 F. 2d 689, rehearing denied October 3, 1955. * * *

"The issues were thereafter re-argued before me at the October term. *It now convincingly appears that the weight of authority favors the defendant in this case.* The opinion as filed speaks for itself and expresses the views of this court at the time it was written. However, a study of the issues and authorities after re-argument of the case and especially upon consideration of the opinion of the Court of Appeals for the Fifth Circuit, filed August 24, 1955, this court has concluded that the decision reached in the opinion was incorrect. This court must, therefore, vacate and set aside the opinion heretofore filed and direct that judgment be entered for the defendant. It will be so ordered." (*Pp. 198.* Emphasis supplied.)

Appellant's brief cites and quotes portions of the article in 55 *A.L.R. (2d)* 1300. It does not quote the following pertinent statement. Under Section 3, titled Summary and comment, it is stated:

"The majority of the courts take the viewpoint that the 'per accident' clause is to be construed from the point of view of the cause of the accident rather than its effect." (*Pp. 1303.*)

Under sub-paragraph (b) of the same Section 3, the annotator said in part:

"The trend of authority definitely is toward the adoption of the viewpoint that the limitation provision provides for a maximum of liability for all injuries and damages proximately resulting from one uninterrupted and continuing cause. The courts seem particularly impressed by the fact that an opposite rule may easily expand the stated limit in the policy into indefinite and larger amounts than the ones on which the premiums were based when a chain reaction or an accident series develops.

"Up to 1955, the chances of several persons damaged or injured through one negligent act of the insured to have their individual claims considered as each covered up to the policy limit were fairly good. Since then, the chances have become slim. The turning point probably is the case of *St. Paul-Mercury Indem. Co. v. Rutland* (1955, CA5th Ga.) 225 F. 2d 689, which, while expressly distinguishing *Anchor Casualty Co. v. McCaleb* (1949, CA5th Tex.) 178 F. 2d 322, a decision coming from the same Court of Appeals must, for practical purposes, be considered as overruling it." (*Pp. 1303.*)

Likewise, under sub-section (c) of the same Section 3, the annotator proposes a suggested test. The suggested test is, of course, the same test basically applied by the courts in the cases cited and referred to above, and under that suggested test, the judgment of the trial court for appellee should be affirmed.

On page 8 of appellant's brief, is the statement that

at the time the policy before the court was written, the only definitive case precisely deciding the question in this action was *Anchor Casualty Company v. McCaleb*, 178 F. (2d) 322 (C. A. 5th, 1948). This is neither a fair statement, nor an accurate statement.

In the first place there was in full force and effect at that time when this policy was written the decision of the California court in *Hyer v. Inter-Insurance Exchange*, 246 Pac. 1055, which is particularly persuasive to a Montana court because of the fact that our statutes were adopted from California. In addition, there was the decision of the Seventh Circuit Court in *Denham v. LaSalle-Madison Hotel Company*, 168 F. (2d) 576, which is far closer in point of fact than the decision of the Fifth Circuit Court in *Anchor Casualty Company v. McCaleb*.

In the second place, the *Anchor Casualty-McCaleb* case is distinguishable in fact and is not controlling. The distinction in fact is well set out in *St. Paul-Mercury Indemnity Company v. Rutland*, in *Truck Insurance Exchange v. Rohde*, and the annotator in 55 A.L.R. (2d) states that for practical purposes, it must be considered that the *St. Paul-Mercury Indemnity Company v. Rutland* case overrules *Anchor Casualty Company v. McCaleb*. In that case, there were a series of interrupted, intermittent blowouts at a well. When one blowout occurred, the wind might be blowing in one direction. At a later blowout, the wind was blowing in another direc-

tion. These several and different blowouts, each one affecting different areas in space, occurred over a period of some fifty hours, and the court very properly considered them as separate accidents.

Furthermore, that the skilled lawyers appellant complains about, who write these policies, did not consider the *Anchor Casualty Company-McCaleb* case to affect the situation is reflected by a discussion in *Volume XXIII, Insurance Counsel Journal*, April, 1956, Pp. 194, entitled "When Does an Accident Become Two Accidents?", the author first discusses the case of *Anchor Casualty Company v. McCaleb*, and then says in connection with it:

"The question was whether more than one 'accident' was involved. In a 2-to-1 decision the court held that each eruption constituted a different event and that multiples of the 'per accident' limit should apply, subject to the aggregate limit of \$25,000. When this decision was handed down, it was the subject of considerable study by insurers and defense attorneys, who were fearful that such reasoning would be destructive of the standard limits of liability provisions. However, it finally was concluded that under all the circumstances no immediate policy revision (a most expensive procedure) should be undertaken. The great probability appeared to be that the decision would not be viewed as a general precedent, but would be held by other courts to the unusual factual circumstances presented in the specific case." (*Pp. 194.*)

The author of the article then discusses in detail the decision of the Fifth Circuit Court in *St. Paul-Mercury Indemnity Company v. Rutland*; followed by a discussion of the *Tri-State Roofing Company v. New Amsterdam*

Casualty Company; followed by a discussion of *Truck Insurance Exchange v. Rohde*; a discussion of the California case of *Hyer v. Inter-Insurance Exchange*, and a discussion of the case of *Denham v. LaSalle-Madison Hotel Company*. In conclusion, the author of the article states:

"Conclusion

"The decision finally reached by the United States Court of Appeals for the Fifth Circuit in the *Rutland* case represents, it is submitted, not only the underwriting intent but also a proper construction of the contract and any others which are similar. To hold otherwise is to attribute to the contracting parties an intent that when an accident occurs, the extent of an insurer's liability does not depend upon the injuries, or the damage which has occurred and the amount of insurance purchased by the insured, but rather is determined by how many persons may happen to be claimants. In the *Rutland* case, for example, under the plaintiff's reasoning the insured would have possessed only \$5,000 worth of protection (the amount for which he paid a premium) if the railroad had owned all the damaged property. However, by reason of the fact that various persons happened to own portions of that property and decided to sue the insured, the elastic policy would have expanded to provide \$30,000 in protection. No provision in any standard form in recent years would support such an unrealistic construction. Every consideration would indicate that the parties to a standard policy make a normal, common-sense contract under which the insured decides to purchase and pay for a definite amount of protection with respect to what all reasonable persons would regard as one accident. To argue otherwise is simply an attempt by an insured to expand the policy by artificial construction so as to obtain additional free insurance at the expense of fellow policyholders." (*Pp. 198.*)

CONCLUSION

We respectfully submit that the weight of authority including decisions from California, Washington, the Fifth Circuit Court, and the Seventh Circuit Court, requires an affirmance in this case that the single, sudden, unintentional, continuous, uninterrupted fire which destroyed the Barrett Building, constituted a single accident for which the express limit of liability in the policy was a total of \$1,000 for the property damage sustained by all the claimants; that there are no controlling Montana decisions, and the decision of the trial court construing what the Montana law would be under these facts coincides with the weight of authority; and the judgment in favor of the appellee and against the appellant should be affirmed.

Respectfully submitted,

COLEMAN, LAMEY & CROWLEY

By CALE CROWLEY

Attorneys for Appellee

No. 16102 ✓

United States
Court of Appeals
for the Ninth Circuit

SEE ALSO
3088

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMER-
ICA, LOCAL No. 839, and INTERNA-
TIONAL UNION OF OPERATING EN-
GINEERS, LOCAL No. 370,

Appellants,

vs.

MORRISON-KNUDSEN COMPANY, INC., a
Corporation,

Appellee.

Transcript of Record
In Three Volumes

Volume I
(Pages 1 to 378)

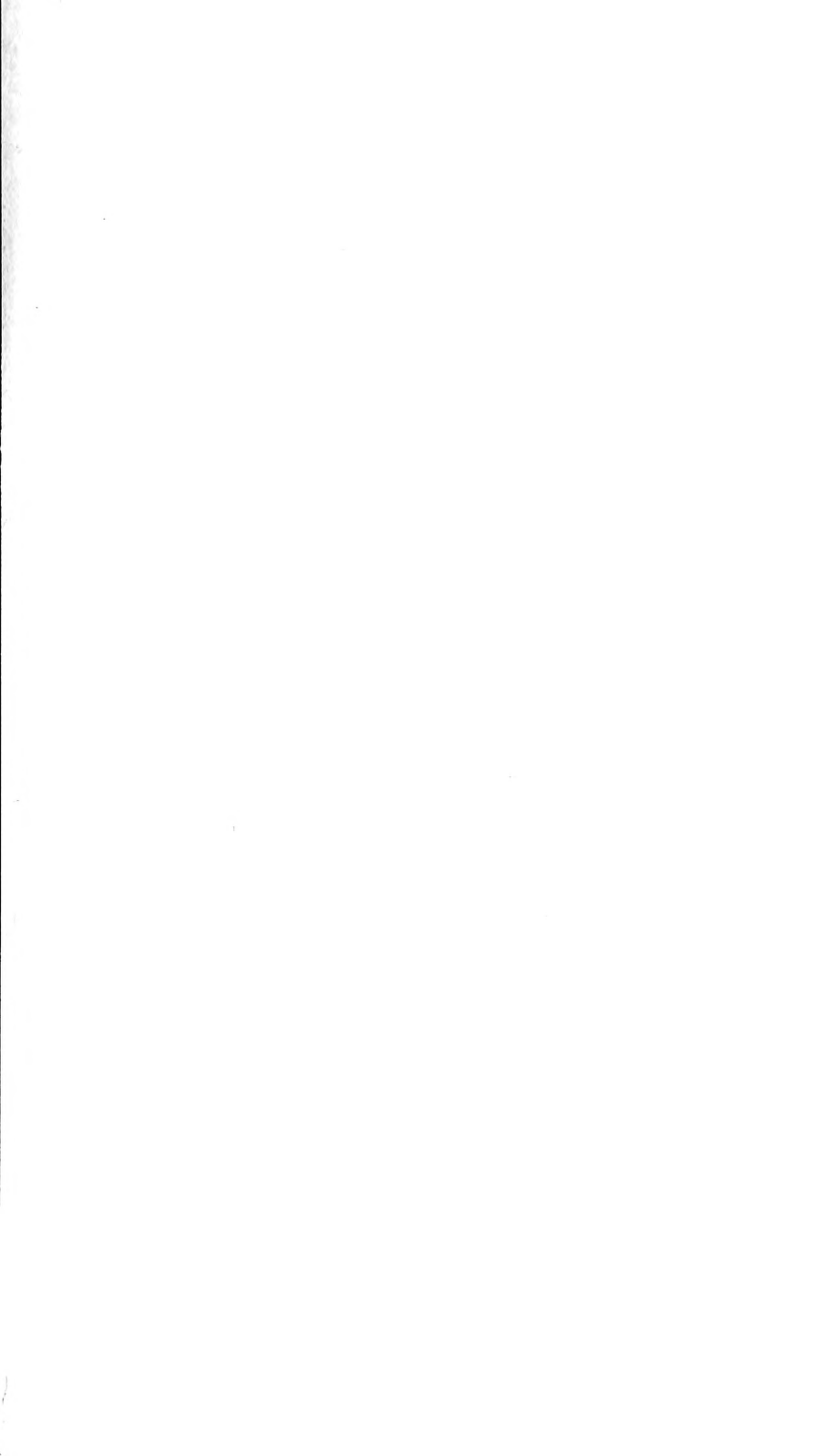
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PAUL P. O'BRIEN, CLERK

Appeal from the United States District Court for the
Eastern District of Washington,
Southern Division.





No. 16102

United States
Court of Appeals
for the Ninth Circuit

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMER-
ICA, LOCAL No. 839, and INTERNA-
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United States District Court for the Eastern
District of Washington, Southern Division

No. 1105

MORRISON-KNUDSEN COMPANY, INC., a
Corporation,

Plaintiff,

vs.

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMER-
ICA LOCAL No. 839; JOINT COUNCIL
OF TEAMSTERS No. 28; WESTERN CON-
FERENCE OF TEAMSTERS; INTERNA-
TIONAL UNION OF OPERATING ENGI-
NEERS, LOCAL No. 370; and INTERNA-
TIONAL UNION OF OPERATING ENGI-
NEERS, AFL,

Defendants.

COMPLAINT

Comes now Morrison-Knudsen Company, Inc., a
corporation and for a cause of action against the
Defendants, and each of them alleges:

I.

That at all times herein mentioned Morrison-
Knudsen Company, Inc., was, and it now is, a cor-
poration, duly organized, existing and doing busi-
ness under and by virtue of the laws of the State
of Delaware with its principal office and place of

business at Boise, Idaho, and during the times herein mentioned it was and now is qualified as and doing business as a foreign corporation within the State of Washington and in Benton County thereof, within the Southern Division of the above-entitled District and Court. That in the activities herein-after mentioned Plaintiff was engaged in an industry affecting commerce as defined by the Labor Management Relations Act of 1947 of the United States and the National Labor Relations Act of the United States. [1*]

II.

That the Defendant, Local No. 839 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which will be hereafter referred to merely as Local No. 839, at all times herein mentioned was, and it now is, a voluntary unincorporated association and labor union, and that said Local No. 839 during all of the times hereinafter mentioned acted as the representative and bargaining agent for its members employed in all Heavy, Highway and Engineering Construction Work within the Eastern portion of the State of Washington, East of the 120th Meridian, including Benton County, and certain portions of the State of Idaho.

That the Defendant Joint Council of Teamsters No. 28, which will hereafter be referred to merely as Joint Council No. 28, is a voluntary unincorporated associated, composed of Local No. 839 and

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

other Local Unions of the same International within the State of Washington, and in all things hereinafter alleged said Local No. 839 acted under the direction, sanction and approval of said Joint Council No. 28 as well as under the direction, sanction and approval of the Western Conference of Teamsters as hereinafter alleged.

That the Defendant Western Conference of Teamsters, which will hereafter be referred to merely as Western Conference, is a voluntary unincorporated association, composed of Joint Council of Teamsters No. 28 and other similar Joint Councils located within the Western states of the United States, and in all things hereinafter alleged Local 839 and Joint Council No. 28 acted under the direction, sanction and approval of said Western Conference.

That the Defendant International Union of Operating Engineers, Local No. 370, which will hereafter be referred to merely as Operating Engineers Local No. 370, is a voluntary [2] unincorporated association and labor union, and during all times herein mentioned said Operating Engineers, Local No. 370, through its officers and Business Manager, acted as representative and bargaining agent for its members employed in all Heavy, Highway and Engineering Construction Work within the Eastern portion of the State of Washington, East of the 120th Meridian, including Benton County, and certain portions of the State of Idaho.

That the Defendant International Union of Operating Engineers, AFL, is, and at all times herein mentioned, was a voluntary unincorporated association, composed of all the Locals of the International within the United States, including Operating Engineers Local No. 370, and in all things hereinafter mentioned the Operating Engineers Local No. 370, and its officers and Business Manager, acted under and in accordance with the direction, sanction and approval of said International Union of Operating Engineers, AFL, which will hereafter be referred to merely as International Union.

That each of said Defendants heretofore named, either has and maintains its principal office, or has offices or agents engaged in representing it or acting for its employee members within the Eastern District of Washington.

III.

That this action is brought and prosecuted pursuant to, and in accordance with, and the jurisdiction of the Court is based upon the provisions of the Labor Management Relations Act of 1947, and more particularly Section 301 thereof, otherwise known as 29 USCA Section 185. That the members of Defendant Local No. 839 and of Defendant Operating Engineers Local No. 370, which were employed by Plaintiff, as hereinafter mentioned, were "employees in an industry affecting commerce as defined" in the Labor Management Relations Act of 1947 of the [3] United States and the National Labor Relations Act of the United States.

IV.

That heretofore and on or about the 25th day of November, 1955, Plaintiff entered into a Contract with the United States Atomic Energy Commission, for the construction of Pumping Plant Additions, Office Additions and Modifications at the Hanford Atomic Products Operation within Benton County, State of Washington, and thereafter on or about November 28, 1955, commenced the performance of said work, and for the purpose of the performance of said Contract employed upon the project numerous members of Local 839 and of Operating Engineers Local No. 370.

V.

That at all times herein mentioned, the Plaintiff was, and it now is, a member in good standing of Associated General Contractors of America, Inc., Spokane Chapter, and as such member Plaintiff assigned and delegated to said Associated General Contractors of America, Inc., Spokane Chapter, its bargaining rights, covering all employee members of Local 839 and of Operating Engineers Local No. 370, as employed by Plaintiff within the area of said Locals, including Benton County, as engaged in Heavy, Highway and Engineering Construction Work. Pursuant to such delegated authority, and on behalf of Plaintiff as one of its members and for the account and benefit of Plaintiff, the Associated General Contractors of America, Inc., Spokane Chapter, as of December 19, 1955, negotiated and entered into a Labor Agreement with Local No.

839, a copy of which is attached hereto as Exhibit A and is by this reference thereto incorporated herein the same as though set forth at length, and under date of December 24, 1955, negotiated and entered into a Labor Agreement with Operating Engineers Local [4] No. 370, a copy of which is attached hereto as Exhibit B and is by this reference thereto incorporated herein and made a part hereof the same as though set forth at length, and which said Agreements, by their express terms, are stated to "cover all Heavy, Highway and Engineering Construction Work in the following counties, or parts of counties, East of the 120th Meridian: * * * Benton * * *" and to provide in Article VIII of the Agreement with Local 839 and in Article IX of the Agreement with Operating Engineers Local 370 that:

"Section 3. There shall be no special job agreements" and in Article VIII of the Agreement with Local 839 and in Article VII of the Agreement with Operating Engineers Local 370 entitled No Strike—No Lockout:

"It is mutually agreed that there shall be no strikes, lockouts, or other slow downs or cessation of work authorized by either party on account of any labor differences pending the full utilization of the grievance machinery set up in Article (IX) (X)."

Said Agreements became effective as of January 1, 1956, and have remained in full force and effect

at all times since, except as breached by Defendants as hereinafter alleged. That prior to the execution of the Agreement, Exhibit A, by Local 839, and as a part of the fixed procedure within the Teamsters Union, the said Agreement was submitted to and approved for execution by the Defendants Joint Council No. 28 and Western Conference. That prior to the execution of the Agreement, Exhibit B, by Operating Engineers Local No. 370, and as a part of the fixed procedure within the International Union, said Agreement was submitted to and approved for execution by said International Union.

VI.

That notwithstanding the terms and provisions of said Labor Agreements, Exhibits A and B hereto, the Defendants Local 839 and Operating Engineers Local No. 370, prior to the 22nd [5] day of March, 1956, and in direct violation of said Agreements, jointly demanded of Plaintiff, through its bargaining agent, Associated General Contractors of America, Inc., Spokane Chapter, the payment of so-called "isolation pay" in the sum of \$2.62 per day for their members working for Plaintiff in the performance of the Contract mentioned in Paragraph IV hereof, over and above the wage scales as provided for by said Agreements, and further jointly demanded free transportation for their members working upon said project from the North Richland Bus Terminal to the site of work within the Hanford Atomic Products Operation area as a

“special job agreement,” which unlawful and illegal demand was by the Associated General Contractors of America, Inc., Spokane Chapter, acting on behalf of Plaintiff, refused. Upon the refusal of Plaintiff, through its bargaining agent and representative aforesaid, to accede to the unlawful and illegal demands of the Defendant Locals, and in violation of the No Strike provisions of said Agreements, Exhibits A and B, the Defendants’ Local No. 839 and Operating Engineers Local No. 370, acting in concert and agreement by and through their respective officers and agents, without utilizing the grievance machinery as set up in said Agreements, Exhibits A and B, and after first receiving the sanction, approval and consent of Joint Council No. 28, Western Conference and International Union, through their respective officers and representatives, caused their membership to strike the work of Plaintiff under its Contract with the United States Atomic Energy Commission, as mentioned in Paragraph IV hereof, and to picket the project, which strike and picketing has at all times since continued and is now continuing notwithstanding the written demand and request of Plaintiff that said members return to their jobs, a copy of which is attached hereto as Exhibit C, and which was sent to Local No. 839, Joint Council No. 28, Western Conference, [6] Operating Engineers Local No. 370 and International Union on April 27, 1956, and received by said Defendants on or about April 30, 1956.

VII.

That by reason of the breach by Defendants of the terms and provisions of the Labor Agreements, Exhibit A and Exhibit B hereto, as heretofore alleged, or the inducing of such breach by Defendants, as heretofore alleged, and the resulting shut down of the operations of Plaintiff caused solely thereby, the Plaintiff suffered damages to April 30, 1956, in the sum of \$638,500.00 and has at all times since continued to suffer, and will continue to suffer until such strike is called off, the membership of Defendant Unions return to work and the effects of said unlawful and illegal strike have been fully eliminated, damages in the minimum amount of \$13,000.00 per calendar day, and together with additional general damages which are not yet fully ascertainable, but which will be supplied as soon as ascertained and prior to the trial of this action.

Wherefore, Plaintiff prays for judgment against the Defendants, and each of them, for the sum of \$638,500.00, together with such additional amounts as may be found due to the Plaintiff from Defendants, and each of them, by way of damages upon the trial of this action; for Plaintiff's costs and disbursements herein to be taxed in the manner provided by law and the Rules of Court, and for such other equitable and legal relief by way of Decree or Judgment herein as may be thought and found proper by the Court.

ALLEN, DeGARMO & LEEDY,

By /s/ GERALD DeGARMO,

DORSEY & HAIGHT,

By /s/ ELI E. DORSEY,
Counsel for Plaintiff.

[Endorsed]: Filed May 8, 1956. [7]

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes now Morrison-Knudsen Company, Inc., a corporation, and for its Amended Complaint herein and as a cause of action against the Defendants and each of them complains and alleges:

I.

That at all times herein mentioned Morrison-Knudsen Company, Inc., was, and it now is, a corporation, duly organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business at Boise, Idaho, and during the times herein mentioned it was and now is qualified as and doing business as a foreign corporation within the State of Washington and in Benton County thereof, within the Southern Division of the above-entitled District and Court. That in the activities hereinafter mentioned Plaintiff was engaged in an industry affecting commerce as defined by the Labor Management Relations Act of 1947 of the United

States and the National Labor Relations Act of the United States. [40]

II.

That the Defendant, Local No. 839 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which will be hereafter referred to merely as Local No. 839, at all times herein mentioned was, and it now is, a voluntary unincorporated association and labor union, and that said Local No. 839 during all of the times hereinafter mentioned acted as the representative and bargaining agent for its members employed in all Heavy, Highway and Engineering Construction Work within the Eastern portion of the State of Washington, East of the 120th Meridian, including Benton County, and certain portions of the State of Idaho.

That the Defendant, Joint Council of Teamsters No. 28, which will hereafter be referred to merely as Joint Council No. 28, is a voluntary unincorporated association, composed of Local No. 839 and other Local Unions of the same International within the State of Washington, and in all things hereinafter alleged said Local No. 839 acted under the direction, sanction and approval of said Joint Council No. 28 as well as under the direction, sanction and approval of the Western Conference of Teamsters as hereinafter alleged.

That the Defendant, Western Conference of Teamsters, which will hereafter be referred to merely as Western Conference, is a voluntary unin-

corporated association, composed of Joint Council of Teamsters No. 28 and other similar Joint Councils located within the Western States of the United States, and in all things hereinafter alleged Local 839 and Joint Council No. 28 acted under the direction, sanction and approval of said Western Conference.

That the Defendant, International Union of Operating Engineers, Local No. 370, which will hereafter be referred to merely as Operating Engineers Local No. 370, is a voluntary [41] unincorporated association and labor union, and during all times herein mentioned said Operating Engineers, Local No. 370, through its officers and Business Manager, acted as representative and bargaining agent for its members employed in all Heavy, Highway and Engineering Construction Work within the Eastern portion of the State of Washington, East of the 120th Meridian, including Benton County, and certain portions of the State of Idaho.

That each of said Defendants heretofore named, either has and maintains its principal office, or has offices or agents engaged in representing it or acting for its employee members within the Eastern District of Washington.

III.

That this action is brought and prosecuted pursuant to, and in accordance with, and the jurisdiction of the Court is based upon the provisions of the Labor Management Relations Act of 1947, and more

particularly Section 301 thereof, otherwise known as 29 USCA Section 185. That the members of Defendant Local No. 839 and of the Defendant Operating Engineers Local No. 370, which were employed by Plaintiff, as hereinafter mentioned, were "employees in an industry affecting commerce as defined" in the Labor Management Relations Act of 1947 of the United States and the National Labor Relations Act of the United States.

IV.

That heretofore and on or about the 25th day of November, 1955, Plaintiff entered into a Contract with the United States Atomic Energy Commission, for the construction of Pumping Plant Additions, Office Additions and Modifications at the Hanford Atomic Products Operation within Benton County, State of Washington, and thereafter on or about November 28, 1955, commenced the performance of said work, and for the [42] purpose of the performance of said Contract employed upon the project numerous members of Local 839 and of Operating Engineers Local No. 370.

V.

That at all times herein mentioned, the Plaintiff was and it now is a member in good standing of Associated General Contractors of America, Inc., Spokane Chapter, and as such member Plaintiff assigned and delegated to said Associated General Contractors of America, Inc., Spokane Chapter, its bargaining rights, covering all employee members

of Local 839 and of Operating Engineers Local No. 370, as employed by Plaintiff within the area of said Locals, including Benton County, as engaged in Heavy, Highway and Engineering Construction Work. Pursuant to such delegated authority, and on behalf of Plaintiff as one of its members and for the account and benefit of Plaintiff, the Associated General Contractors of America, Inc., Spokane Chapter, as of December 19, 1955, negotiated and entered into a Labor Agreement with Local No. 839, a copy of which is attached to the original Complaint herein as Exhibit "A" and is by this reference thereto incorporated herein the same as though set forth at length, and under date of December 24, 1955, negotiated and entered into a Labor Agreement with Operating Engineers Local No. 370, a copy of which is attached to the original Complaint herein as Exhibit "B" and is by this reference thereto incorporated herein and made a part hereof the same as though set forth at length, and which said Agreements, by their express terms, are stated to "cover all Heavy, Highway and Engineering Construction Work in the following counties, or parts of counties, East of the 120th Meridian: * * * Benton * * *" and to provide in Article VIII of the Agreement with Local 839 and in Article IX of the Agreement with Operating Engineers Local 370 that: [43]

"Section 3. There shall be no special job agreements" and in Article VIII of the Agreement with Local 839 and in Article VII of the Agreement

with Operating Engineers Local 370 entitled No Strike-No Lockout:

“It is mutually agreed that there shall be no strikes, lockouts, or other slow downs or cessation of work authorized by either party on account of any labor differences pending the full utilization of the grievance machinery set up in Articles (IX) (X).”

Said Agreements became effective as of January 1, 1956, and have remained in full force and effect at all times since, except as breached by Defendants as hereinafter alleged. That prior to the execution of the Agreement, Exhibit “A,” by Local 839, and as a part of the fixed procedure within the Teamsters Union, the said Agreement was submitted to and approved for execution by the Defendants Joint Council No. 28 and Western Conference.

VI.

That notwithstanding the terms and provisions of said Labor Agreements, Exhibits “A” and “B,” heretofore mentioned, the Defendants Local 839 and Operating Engineers Local No. 370, prior to the 22nd day of March, 1956, and in direct violation of said Agreements, jointly demanded of Plaintiff, through its bargaining agent, Associated General Contractors of America, Inc., Spokane Chapter, the payment of so-called “isolation pay” in the sum of \$2.62 per day for their members working for Plaintiff in the performance of the Contract mentioned in Paragraph IV hereof, over and above the wage

scales as provided for by said Agreements, and further jointly demanded free transportation for their members working upon said project from the North Richland Bus Terminal to the site of work within the Hanford Atomic Products Operation area as a "special job agreement," which unlawful and illegal demand was by the Associated General Contractors of America, Inc., Spokane Chapter, acting on behalf of Plaintiff, refused. Upon the refusal of Plaintiff, through its bargaining [44] agent and representative aforesaid, to accede to the unlawful and illegal demands of the Defendant Locals, and in violation of the No Strike provisions of said Agreements, Exhibits "A" and "B," the Defendants Local No. 839 and Operating Engineers Local No. 370, acting in concert and agreement by and through their respective officers and agents, without utilizing the grievance machinery as set up in said Agreements, Exhibits "A" and "B," and after first receiving the sanction, approval and consent of Joint Council No. 28 and Western Conference, through their respective officers and representatives, caused their membership to strike the work of Plaintiff under its Contract with the United States Atomic Energy Commission, as mentioned in Paragraph IV hereof, and to picket the project, which strike and picketing continued (notwithstanding the written demand and request of Plaintiff that said members return to their jobs, a copy of which is attached to the original Complaint herein as Exhibit "C" and which is by this reference thereto incorporated herein the same as though set forth at

length and which was sent to Local No. 839, Joint Council No. 28, Western Conference and Operating Engineers Local No. 370 and received by said Defendants on or about April 30, 1956), until June 6, 1956, at which time the Defendants agreed to resume work only upon the illegal demand and condition which was accompanied by the threat of the continuation of said illegal and unlawful strike that Plaintiff, through the Associated General Contractors of America, Spokane Chapter, continue in effect the claimed "status quo" as it was alleged by said Defendants to have existed on March 21, 1956, and submit to a hearing before the Atomic Energy Labor Management Relations Panel. Plaintiff, through said Associated General Contractors of America, Spokane Chapter, and under said illegal demand, condition and threat of strike acquiesced in such demands and conditions without prejudice to its contention [45] and position the continued payment of isolation pay and furnishing of bus transportation were contrary to and in violation of its Contracts with Defendants, Exhibits "A" and "B" heretofore mentioned. That Plaintiff herein claims the right to recover from Defendants, as a part of the damages sustained by it and as hereinafter mentioned, all sums paid to the membership of Defendants for isolation pay and the cost of furnishing bus transportation from said date of June 6, 1956, as having been paid under duress, coercion, threat of strike and contrary to and in violation of the Agreements, Exhibits "A" and "B" heretofore mentioned.

VII.

That by reason of the breach by Defendants of the terms and provisions of said Labor Agreements, Exhibits "A" and "B" hereinbefore mentioned, as hereinbefore alleged or the inducing of such breach by Defendants, as heretofore alleged, and the resulting shut down of the operations of Plaintiff caused solely thereby the Plaintiff has suffered, or will suffer, loss and damages in the sum of \$248,127.00 for which amount the Defendants and each of them are liable to Plaintiff.

Wherefore, Plaintiff prays for judgment herein against the Defendants and each of them for the sum of \$248,127.00, for Plaintiff's costs and disbursements herein to be taxed in the manner provided by law and the rules of this Court, and for such other equitable and legal relief by way of Decree or Judgment herein as may be thought and found proper by the Court.

ALLEN, DeGARMO & LEEDY
DORSEY & HAIGHT,

By /s/ GERALD DeGARMO,
Counsel for Plaintiff.

[Endorsed]: Filed November 9, 1956. [46]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL No. 839; JOINT COUNCIL OF TEAMSTERS No. 28; AND WESTERN CONFERENCE OF TEAMSTERS TO AMENDED COMPLAINT

Answering the plaintiff's amended complaint the defendants, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 839, Joint Council of Teamsters No. 28 and Western Conference of Teamsters, admit, deny and allege as follows:

I.

Answering paragraph I these defendants admit that the plaintiff is engaged in an industry affecting commerce within the meaning of the Labor Management Relations Act of 1947, and deny any knowledge or information sufficient to form a belief concerning all the other allegations of said paragraph.

II.

These defendants admit the allegations of the first paragraph of paragraph II.

Answering the second paragraph of paragraph II they admit that Joint Council of Teamsters No. 28 is a voluntary unincorporated association; admit that Local 839 and other local unions chartered by

International Brotherhood of Teamsters within the State of Washington are affiliated with said Joint Council; and deny all the other allegations of said paragraph.

Answering the third paragraph of paragraph II they admit [47] that Western Conference of Teamsters is a voluntary unincorporated association; admit that Joint Council of Teamsters No. 28 and other similar joint councils located within the Western States of the United States are affiliated with said Western Conference, and deny all the other allegations of said paragraph.

These defendants make no answer to the fourth paragraph of said paragraph II relating to International Union of Operating Engineers, Local 37.

Answering the fifth paragraph of paragraph II the defendant Teamsters Local No. 839 admits that it maintains its principle office and has officers or agents engaged in representing it and its members within the Eastern District of Washington. The defendants Joint Council No. 28 and Western Conference deny the allegations of said paragraph as it refers to them or either of them.

III.

Answering paragraph III of the amended complaint these defendants admit that the plaintiff claims that this is an action brought and being prosecuted pursuant to the provisions of Labor Management Relations Act of 1947, but they deny that plaintiff has a cause of action against the de-

endants, or any of them, by reason of any of the matters alleged in its amended complaint.

IV.

Answering paragraph IV these defendants admit that the plaintiff has been performing construction work for the United States Atomic Energy Commission within the Hanford Works Project area and that in connection with that work it employed members of Teamsters Local 839. Defendants admit that said area is in part within the exterior limits of Benton County, Washington, but deny that the said area for the purposes of the labor contracts referred to in the plaintiff's amended complaint is a part of said Benton County, and deny any knowledge or information concerning [48] all the other allegations of said paragraph.

V.

Answering paragraph V these defendants admit that on or about December 19, 1955, the Associated General Contractors of America, Inc., Spokane Chapter, negotiated and entered into a labor agreement with the defendants Teamsters Local 839 and other Teamsters local unions, a copy of which is attached to the original complaint as Exhibit "A"; admit that Article VIII, Section 3 of said agreement provides "there shall be no special job agreements"; admit that said agreement became effective on all work covered thereby as of January 1, 1956; they deny that said agreement was submitted to and approved for execution by Joint Council No. 28 or

by Western Conference of Teamsters either as a part of any fixed procedure within the Teamsters Union or at all; admit that after its effective date said agreement has remained in full force and effect; and deny any knowledge or information sufficient to form a belief concerning all the other allegations of said paragraph.

VI.

Answering paragraph VI these defendants deny each and every allegation thereof.

VII.

Answering paragraph VII of said amended complaint each of these defendants deny that they, or any of them, breached or induced a breach of any of the terms or provisions of the labor agreement identified as Exhibits "A" or "B," and deny that the plaintiff has suffered or will suffer damage in the sum alleged or in any sum whatsoever.

Further answering plaintiff's amended complaint and as an Affirmative Defense these defendants allege:

I.

The contract between the plaintiff and the United States [49] Atomic Energy Commission, described in paragraph IV of the plaintiff's amended complaint, related to and is limited to construction work to be performed by plaintiff within an area located within the exterior limits of Benton County, Washington, and the adjoining counties of Franklin, Yakima and Grant, acquired by the Federal Govern-

ment, with the consent of the State of Washington, for purposes of national defense and used by the Federal Government and its agencies for the purposes designated in Atomic Energy Act of 1946. Said area, although in part within the exterior boundaries of Benton County, has always been regarded by labor unions and by contractors as segregated from the remainder of Benton County for the purpose of negotiating labor agreements and was so regarded when the labor agreements described in the plaintiff's original and amended complaints were being negotiated. For many years prior to and during the year 1955 all contractors, contracting with the United States Atomic Energy Commission for the performance of construction work in said area, have negotiated their labor agreements with labor unions, including the defendant Local 839, through their bargaining representative known as Hanford Contractors Negotiating Committee; and all of such contractors, who at the same time were engaged in performing construction work in Benton County and adjoining counties but not within said area, negotiated their labor agreements with labor organizations, including Local 839, through another and different bargaining representative known as Associated General Contractors of America, Inc., Spokane Chapter.

The agreement dated the 19th day of December, 1955, by and between Associated General Contractors of America, Inc., Spokane Chapter, and Teamsters Unions Locals 690, 148, 556, 551 and 839 (at-

tached to plaintiff's original complaint as Exhibit "A") does not apply and was not intended to apply to construction work to be performed by plaintiff for Atomic Energy Commission [50] under the contract described in paragraph IV of the amended complaint.

Wherefore, having fully answered, these defendants pray that the plaintiff's amended complaint be dismissed and that they have judgment for their costs and disbursements herein.

BASSETT, GEISNESS &
VANCE,

/s/ STEPHEN V. CAREY,

Attorneys for Defendants, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 839; Joint Council of Teamsters No. 28; and Western Conference of Teamsters.

Receipt of Copy acknowledged.

[Endorsed]: Filed December 13, 1956. [51]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL No. 370, TO AMENDED COMPLAINT

Comes now defendant, International Union of Operating Engineers, Local No. 370, through its counsel, R. Max Etter, and for answer to plaintiff's

Amended Complaint on file herein, admits, denies and alleges as follows:

I.

Defendant admits that the plaintiff is engaged in an industry affecting commerce within the meaning of the Labor-Management Relations Act of 1947; and denies any knowledge or information sufficient to form a belief concerning all other allegations of said Paragraph I of the plaintiff's amended complaint.

II.

Defendant admits the allegations of the fourth paragraph of Paragraph II of plaintiff's amended complaint.

Answering the first, second and third paragraphs of Paragraph II of plaintiff's amended complaint, this defendant makes no answer to said paragraphs relating as they do to Teamster organizations and defendants named.

Answering the fifth paragraph of Paragraph II of plaintiff's amended complaint, defendant Local No. 370, admits that it [52] maintains its principal office and has officers or agents engaged in representing it and its members within the Eastern District of Washington, and this defendant makes no answer with respect to any allegations relating to other defendants named.

III.

Answering Paragraph III of the amended complaint, this defendant admits that the plaintiff

claims that this is an action brought and being prosecuted pursuant to the provisions of the Labor-Management Relations Act of 1947, but denies that plaintiff has a cause of action against this defendant, Local No. 370, by reason of any of the matters alleged in the amended complaint.

IV.

Answering Paragraph IV of the amended complaint, this defendant admits that the plaintiff has been performing construction work for the United States Atomic Energy Commission within the Hanford Works Project Area, and that in connection with that work it employed members of Local No. 370 Operating Engineers. This defendant admits that this area is in part within the exterior limits of Benton County, Washington, but denies that the said area for the purposes of the labor contracts referred to in the plaintiff's amended complaint is a part of said Benton County, and denies any knowledge or information concerning all of the other allegations of said paragraph.

V.

Answering Paragraph V of plaintiff's amended complaint, this defendant, Local No. 370, admits that on or about December 24th, 1955, the Associated General Contractors of America, Inc., Spokane Chapter, negotiated and entered into a labor agreement with defendant, Local No. 370, Operating Engineers, a copy of which is attached to plaintiff's original complaint as Exhibit "B"; admits that

Article IX, Section 3 of said agreement provides: "there shall be no special job agreements"; admits that said agreement became [53] effective on all work covered thereby as of January 1st, 1956; this defendant admits that after its effective date said agreement has remained in full force and effect, and denies any knowledge or information sufficient to form a belief concerning all of the other allegations of said paragraph.

VI.

This defendant denies each and every allegation of plaintiff's amended complaint as set forth and alleged in Paragraph VI of its amended *plaintiff*.

VII.

Answering Paragraph VII of said amended complaint, this defendant denies that it breached, or induced a breach of any of the terms or provisions of the labor agreement identified as Exhibits "A" or "B" and denies that the plaintiff has suffered, or will suffer, damage in the sum alleged, or in any sum whatsoever.

By Way of Further Answer and as an Affirmative Defense, This Defendant Alleges:

I.

The contract between the plaintiff and the United States Atomic Energy Commission, described in Paragraph IV of the plaintiff's amended complaint, related to and is limited to construction work to be performed by plaintiff within an area located within the exterior limits of Benton County, Washington,

and the adjoining counties of Franklin, Yakima and Grant, acquired by the Federal Government, with the consent of the State of Washington, for purposes of national defense, and used by the Federal Government and its agencies for the purposes designated in Atomic Energy Act of 1946. Said area, although in part within the exterior boundaries of Benton County, has always been regarded by labor unions and by contractors as segregated from the remainder of Benton County for the purpose of negotiating labor agreements, and was so [54] regarded when the labor agreements described in the plaintiff's original and amended complaints were being negotiated. For many years prior to and during the year 1955, all contractors contracting with the United States Atomic Energy Commission for the performance of construction work in said area, have negotiated their labor agreements with labor unions, including the defendant Local No. 370, through their bargaining representative known as Hanford Contractors Negotiating Committee; and all of such contractors, who at the same time were engaged in performing construction work in Benton County, and adjoining counties, but not within said area, negotiated their labor agreements with labor organizations, including Local No. 370, through another and different bargaining representative known as Associated General Contractors of America, Inc., Spokane Chapter.

The agreement dated the 24th day of December, 1955, by and between Associated General Contrac-

tors of America, Inc., Spokane Chapter, and Local No. 370 Engineers Union (attached to plaintiff's original complaint as Exhibit "B") does not apply, and was not intended to apply, to construction work to be performed by plaintiff for Atomic Energy Commission under the contract described in Paragraph IV of the amended complaint.

Wherefore, having fully answered, this defendant prays that the plaintiff's amended complaint be dismissed, and that it have judgment for its costs and disbursements herein.

/s/ R. MAX ETTER,

Attorney for Defendant, International Union of
Operating Engineers, Local No. 370.

Affidavit of Mail attached.

[Endorsed]: Filed December 19, 1956. [55]

[Title of District Court and Cause.]

REPLY OF PLAINTIFF TO ANSWER OF DEFENDANTS, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL No. 839; JOINT COUNCIL OF TEAMSTERS No. 28 AND WESTERN CONFERENCE OF TEAMSTERS TO AMENDED COMPLAINT

Comes now Morrison-Knudsen Company, Inc., a corporation, Plaintiff in the above-entitled action,

and for reply to the matter pleaded "By Way of Further Answer and as an Affirmative Defense" in the Answer of Defendants, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 839, Joint Council of Teamsters No. 28 and Western Conference of Teamsters to Amended Complaint herein, admits, denies and alleges as follows:

I.

Admits that the Contract between the Plaintiff and the United States Atomic Energy Commission described in paragraph IV of the Plaintiff's Amended Complaint related to and is limited to construction work to be performed by Plaintiff within an area located within the exterior limits of Benton County, Washington, and the adjoining counties of Franklin, Yakima and Grant, acquired by the Federal Government for purposes of national defense and used by the Federal Government and its agencies for the purposes [57] designated in the Atomic Energy Act of 1946 and as amended by the Atomic Energy Act of 1954, and denies each and every other allegation in said Further Answer and Affirmative Defenses contained not expressly admitted.

Wherefore, having replied to the affirmative matter as set forth in the Answer of Defendants, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 839, Joint Council of Teamsters No. 28 and Western Conference of Teamsters to the Amended Com-

plaint of the Plaintiff, the Plaintiff, Morrison-Knudsen Company, Inc., a corporation, prays for the entry of Judgment herein in accordance with the prayer of its Amended Complaint.

ALLEN, DeGARMO & LEEDY
and DORSEY & HAIGHT,

By /s/ GERALD DeGARMO,
Attorneys of Record for
Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 11, 1957. [58]

[Title of District Court and Cause.]

REPLY OF PLAINTIFF TO ANSWER OF DEFENDANT, INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL No. 370, TO AMENDED COMPLAINT

Comes now Morrison-Knudsen Company, Inc., a corporation, Plaintiff in the above-entitled action, and for reply to the matter pleaded "By Way of Further Answer and as an Affirmative Defense" in the Answer of Defendant, International Union of Operating Engineers, Local No. 370 to Amended Complaint herein, admits, denies and alleges as follows:

I.

Admits that the Contract between the Plaintiff and the United States Atomic Energy Commission

described in paragraph IV of the Plaintiff's Amended Complaint related to and is limited to construction work to be performed by Plaintiff within an area located within the exterior limits of Benton County, Washington, and the adjoining Counties of Franklin, Yakima and Grant, acquired by the Federal Government for purposes of national defense and used by the Federal Government and its agencies for the purposes designated in the Atomic Energy Act of 1946 and as amended by the Atomic Energy Act of 1954, and denies each and every other [59] allegation in said Further Answer and Affirmative Defense contained not expressly admitted.

Wherefore, having replied to the affirmative matter as set forth in the Answer of Defendant, International Union of Operating Engineers, Local No. 370, to the Amended Complaint of the Plaintiff the Plaintiff, Morrison-Knudsen Company, Inc., a corporation, prays for the entry of Judgment herein in accordance with the prayer of its Amended Complaint.

ALLEN, DeGARMO & LEEDY
and DORSEY & HAIGHT,

By /s/ GERALD DeGARMO,
Attorneys of Record for
Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 11, 1957. [60]

[Title of District Court and Cause.]

MOTION FOR MORE DEFINITE STATEMENT

The defendants move for a more definite statement of the damages alleged in paragraph VII of plaintiff's amended complaint by stating in detail the items of damage claimed to have been sustained by the plaintiff aggregating \$248,127.00.

/s/ R. MAX ETTER,

Attorney for Defendant, International Union of
Operating Engineers, Local No. 370.

BASSETT, VANCE & DAVIES,

/s/ STEPHEN V. CAREY,

Attorneys for Defendants, International Brother-
hood of Teamsters, Chauffeurs, Warehousemen
and Helpers of America, Local No. 839; Joint
Council of Teamsters No. 28; Western Con-
ference of Teamsters.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 9, 1957. [61]

[Title of District Court and Cause.]

**BILL OF PARTICULARS IN RESPONSE TO
MOTION FOR MORE DEFINITE STATE-
MENT**

Comes now Morrison-Knudsen Company, Inc., a corporation, Plaintiff in the above-entitled action and in response to the Motion of the Defendants for a more definite statement of the damages as alleged

in paragraph VII of Plaintiff's Amended Complaint submit the following itemization thereof by way of Bill of Particulars:

Summary of Extra Costs Attributable to Strike of
Operating Engineers and Teamsters at Han-
ford Works of United States Atomic Energy
Commission During Period March 22, 1956, to
June 5, 1956, Inclusive

1. Overhead salaries during strike	\$ 13,635.26
2. Office rent, furnishings & engineering equipment	1,134.73
3. Transportation to protect property during strike	1,156.00
4. Director of Labor Relations costs . . .	1,294.00
5. Telephone expense	611.99
6. Legal expense	10,000.00
7. Re-employment costs after strike . . .	926.26
8. Equipment rentals	29,592.59
9. Liquidated damages	30,000.00
10. Interest on investment	1,821.00
11. Loss of profits	72,050.00
12. General administrative expense	21,615.00
13. Extra strength concrete	624.00
14. Wage increase after January 1, 1957	1,869.00
15. Extended time maintaining General Electric Company offices	628.31
16. Efficiency loss for labor and supplies	55,280.00
17. Status quo transportation and isola- tion	5,888.86
<hr/>	
Total	\$248,127.00

ALLEN, DeGARMO & LEEDY
DORSEY & HAIGHT,

By /s/ GERALD DeGARMO,
Attorneys of Record for
Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 17, 1957. [63]

[Title of District Court and Cause.]

NOTICE OF TRIAL AMENDMENT OF PLEAD-
INGS AND OF BILL OF PARTICULARS
CONCERNING DAMAGES

To: International Brotherhood of Teamsters,
Chauffeurs, Warehousemen and Helpers of
America, Local No. 839 and to Its Attorneys
Bassett, Davies & Roberts and Stephen V.
Carey

And to: International Union of Operating En-
gineers, Local No. 370 and to R. Max
Etter, Its Attorney.

You and Each of You are hereby notified and
informed that the Plaintiff in the above-entitled
action at the commencement of the trial of the dam-
ages issues will move the Court for permission to
amend its damages claim and the Bill of Particu-
lars, served with respect thereto, as follows:

I.

The various items of the Bill of Particulars, heretofore served and filed in this cause, will be amended and supplemented as follows:

Item 1—Overtime Salaries During Strike will be amended by increasing the amount thereof from \$13,635.26 to the sum of..... \$13,940.28

The details of the Overhead Salaries During Strike is as follows:

Week ending April 1	\$ 1,456.16
“ “ April 8	1,402.98
“ “ April 15	1,456.16
“ “ April 22	1,386.93
“ “ April 29	1,456.16
“ “ May 6	1,286.54
“ “ May 13	1,233.46
“ “ May 20	1,135.38
“ “ May 27	796.15
“ “ June 3	782.30
Week days of June 4 and 5.....	280.76
	<hr/>
	\$12,672.98
10% Insurance and Taxes	1,267.30
	<hr/>
	\$13,940.28

The details of the personnel paid the amounts above during the period indicated is as follows:

F. R. Alexander, Typist	\$ 379.52
R. D. Edwards, Instrumentman	519.25
R. R. Faust, General Supt.	1,569.20
G. J. McMillan, Chief of Party	679.64
Ralph Nelson, Office Manager	1,439.98
R. E. Reed, Project Manager	2,660.04
M. K. Stice, Secretary	449.97
E. J. White, Project Engineer	1,615.40
L. L. Bean, General Foreman	1,200.00

G. F. Bates, Erection Supt. 2,159.98

\$12,672.98

10% Insurance and Taxes 1,267.30

\$13,940.28

Item 2—Office Rent, Furnishings and Engineering

Equipment—No change 1,134.73

Item 3—Transportation to Protect Property During

Strike—No change 1,156.00

The detail of the transportation claim is as follows:

R. R. Faust.....	20 trips to Work Areas	85 mi.
L. L. Bean	19 " " " "	85 mi.
E. J. White	12 " " " "	85 mi.
G. T. Bates	20 " " " "	85 mi.
G. J. McMillan	21 " " " "	85 mi.
R. E. Reed	13 " " " "	85 mi.

105 trips

105 trips at 85 miles = 8,925 miles at 10c.....\$ 892.50

R. E. Reed—trips to Seattle, Spokane and local—2,335 miles at 10c..... 233.50

E. J. White—local travel—300 miles at 10c.... 30.00

Total\$1,156.00

Item 4.—Director of Labor Relations Cost—No

change. See details attached as Exhibit "A" 1,294.00

Item 5—Telephone Expense will be amended by in-

creasing the amount thereof from \$611.99 to 625.86

Accordingly the detail of the item as furnished by Bill of Particulars will be amended as follows:

Richland office only—

One-half of March telephone bill.....\$ 97.41

April billing 237.92

May billing 120.62

Three-fourths of June billing 169.91

\$625.86

Item 6—Legal Expense which was shown as estimated in the amount of \$10,000.00 will be amended and decreased to the sum of 750.00

Item 7 — Re-employment Costs After Strike — No change 926.26

The detail of the carpenters, laborers and Teamsters terminated and new hires, together with the process time involved for each is as follows:

Carpenters		
Terminated Due to Strike	Hired to Replace	Process Time
C. Roberts	E. Hughes	3
H. Riddle	G. Johnston	3
G. Schwartz	C. Swain	4
L. Allan	E. Thackman	8
R. Brown	S. Thompson	8
J. McNew	G. Schwartz	4
W. Roy	M. Locke	4
K. Scott	M. Martinson	4
H. Boswell	R. Fennell	4
R. Russelton	D. Williams	4
J. Cox	C. Davenport	3
E. Carlington	H. Lucke	4
R. Hendrix	B. Bailey	4
A. Jundt	M. Lashok	5
M. Jundt	O. Waymire	6
C. Potts	W. Keith	6
E. Sartain	D. Jones	5½
G. Trebnik	C. Deffenbaugh	3
A. Woffinden	C. Pickett	4
R. Young	M. Flabber	4
G. Ouderkirk	I. Gilstrap	8
		<hr/>
		98½

Laborers

J. Smithers	W. Reynolds	4
G. Taylor	G. Anderson	4
J. Edmonson	P. Ortiz	4
J. Schermer	A. Nauditt	11

P. Snyder	V. Rowlette	4
L. Waddell	L. Rafferty	8
P. Vaughn	W. Waterhouse	8

43

Teamsters

E. McBride	G. Wren	5½
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Carpenters, 98½ hrs. at \$2.90	\$285.65
Laborers, 43 hrs. at \$2.27	97.61
Teamsters, 51½ hrs. at \$2.40	13.20

\$396.46

P/R Tax Insurance, 10%	39.65
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\$436.11

Cost to recruit additional supervision:

M. Williams, Carpenters Foreman, reported June 25, cleared for areas June 28, lost time 3/5 of \$161.54	\$ 96.92
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J. Bultman, Carpenter Foreman, reported July 9, ½ day clearing	15.00
Medical reject, 7/23-7/27	150.00

T. Hooper, Superintendent, 1 day clearing 1/5 of \$184.62.....	36.92
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\$298.84

P/R Taxes, Insurance, 10%	29.88
---------------------------------	-------

328.72

T. Hooper, Superintendent, plane fare, Knoxville, Tenn., to Pasco, Washington	161.43
---	--------

\$926.26

Item 8—Equipment Rentals—No change	29,592.59
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Item 9—Liquidated Damages which were shown upon the original Bill of Particulars in the estimated amount of \$30,000.00 will be amended by eliminating all reference to liquidated damages, inasmuch as extensions of Contract completion time were granted Plaintiff by the Atomic Energy Commission on account of the strike delay, which eliminated any claim for liquidated damages on its part. The element of extra costs due to speed up of work in order to overcome the delay in the production schedule necessitated by the strike is included in and covered by other Items as herein set forth.

Item 10—Interest on Investment will be amended by decreasing the amount thereof from \$1,821.00 to.... 1,804.68

Accordingly the detail of said item as furnished by Bill of Particulars will be amended as follows:

Job Investment—April 30, 1956.....	\$145,987.31
May 31, 1956.....	148,229.90
June 30, 1956.....	152,989.56
June 31, 1956.....	224,987.07

Average investment per month	168,048.46
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Job Progress Delay Due to Strike:

Total days behind schedule Oct. 1, 1956.....	128 days
--	----------

Less

Days behind schedule March 22, 1956.....	18 days
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Days delay due to Carpenters and Laborers

strike June 6 through June 17, 1956.....	12 days
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Days delay due to Teamsters and Operating

Engineers strike	98 days
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98/365 × 4% × \$168,048.46	\$1,804.68
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Item 11—Loss of Profits will be amended by decreasing the amount thereof from \$72,050.00 to..... 64,190.00

Accordingly the detail of said item as furnished by Bill of Particulars will be amended as follows:

Loss of profit due to inability to produce scheduled revenue during period affected by strike of 3/22/56

		Original Scheduled Revenue	Actual Revenue	Net Revenue Short
April	30 days	\$240,513.00	.....	\$240,513.00
May	31 days	248,805.00	.....	248,805.00
June	30 days	213,262.00	\$104,972.00	108,290.00
<hr/>		<hr/>	<hr/>	<hr/>
Total	91 days	\$702,380.00	\$104,972.00	\$597,608.00
Average per day.....		7,700.00	1,150.00	6,550.00
Total Loss of Profit = 98 days × \$6,550 at 10% = \$64,190.00				

Item 12—General Administrative Expense will be amended by decreasing the amount thereof from \$21,615.00 to the sum of 19,257.00

Accordingly the detail of said item as furnished by Bill of Particulars will be amended as follows:

98 days delay due to strike × \$6,550.00 the loss of profit per day = \$641,900.00 × 3% charged as administrative expense = \$19,257.00.

Item 13—Extra Strength Concrete will be amended and increased from \$624.00 to the sum of..... 675.75

The detail of this item is as follows:

450½ cu. yds. of concrete at \$1.50 per cu. yd. = \$675.75.

Item 14—Wage Increase After January 1, 1957, will be amended by increasing the amount thereof from \$1,689.40 to the sum of 2,378.55

The details of said amount which at the time of furnishing the Bill of Particulars was based upon estimates, can now be accurately computed from bookkeeping records of Plaintiff, are as follows:

1. Tabulation of Total Craft Hours Worked—See Exhibit sheet immediately following as 7(a).
2. Tabulation of Total Craft Hours Worked on Reimbursed Extra Work at 1957 rates—See Exhibit sheet immediately following as 7(b).
3. Extra Cost Due to Wage Increase After January 1, 1957—See Exhibit sheet immediately following as 7(c).

Item 15—Extended Time Maintaining General Electric Company Offices will be amended by decreasing the amount thereof from \$628.31 to the sum of 547.30

Accordingly the detail of said item as furnished by Bill of Particulars will be amended to read as follows:

Office maintenance during period work extended due to strike—98 days—adjusted for 5 days per week

$98 \times 5/7 = 70$ days each for 100F and 100H Areas—1 hour required per day each Area to service each office

1956—128 hours at \$2.27	\$290.56
1957— 12 hours at \$2.40	28.80
Taxes and insurance—10%	31.94
10 gal. oil per day—98 days at 20c gal.	196.00
	<hr/>
	\$547.30

Item 16—Efficiency Loss for Labor and Supplies will be amended and increased from \$55,280.00 to the sum of 92,835.29

The details of said amount and which at the time of the service of the original Bill of Particulars were based in part upon estimates are as follows:

(1) Labor

100 H Area

Labor cost to March 31, 1956.....	\$ 30,111.15
1,440 cu. yds. poured	20.91 cu. yd.
Labor cost to Sept. 30, 1956.....	111,698.81
Less cost to March 31, 1956.....	30,111.15
	<hr/>
Labor cost 6-6-56 to 9-30-56	\$ 81,587.66
1,772 cu. yds. poured	46.04 cu. yd.
Cu. yd. cost prior to March 31, 1956	20.91
	<hr/>
Excess cost of labor per	
cu. yd. after strike	25.13
1,772 cu. yds. x excess cost	
of \$25.13 cu. yd =	\$ 44,530.36

100 F Area

Labor cost to March 31, 1956	51,417.85
1,810 cu. yds. poured	28.41 cu. yd.
Labor cost to Sept. 30, 1956	140,889.43
Less cost to March 31, 1956	51,417.85
<hr/>	
Labor cost 6/6/56 to 9/30/56	89,471.58
2,253 cu. yds. poured	39.71 cu. yd.
Cu. yd. cost prior to strike	28.41
<hr/>	
Excess cost of labor per cu. yd. after strike	11.30
2,253 cu. yds. x excess cost of \$11.30 cu. yd. =	25,458.90

- (2) Extra concrete forms, hardware and supplies required due to cracking and warping during strike and lack of scheduled number of reuses because of efficiency lag.

100 F

Uniform rental and supplies	21,866.53
Lumber, prefabrication forms	8,712.14
Scaffolding materials, etc.	2,454.53
Misc., small tools, etc.	5,417.55
Strip, misc., tools	106.26
<hr/>	
Total actual cost	\$ 38,557.01
Total actual cost (Fwd.)	\$ 38,557.01
Total yardage poured 4,168. cu. yd.	
Estimated cost per cu. yd.....	\$6.14 25,591.52
<hr/>	
Excess cost due to strike	\$ 12,965.49

100 H

Uniform rental and supplies	17,032.96
Lumber, prefabricated forms	9,241.11
Scaffolding material, etc.	1,939.40
Misc., small tools, etc.	3,835.04
Strip, misc. tools	1.87
<hr/>	
Total actual cost	32,050.38
Total yardage poured 3,416 cu. yd.	
Estimated cost per cu. yd.....	\$6.49 22,169.84
<hr/>	
Excess cost due to strike	9,880.54

RECAPITULATION

Excess Labor Cost

100 H Area	\$ 44,530.36
100 F Area	25,458.90

Excess Material Cost

100 F Area	\$ 12,965.49
100 H Area	9,880.54

\$ 92,835.29

Item 17—STATUS QUO TRANSPORTATION AND ISOLATION PAY will be amended and increased from \$5,888.86 to the sum of\$7,072.64

The details of said amount and the amendment of the Bill of Particulars heretofore served, which was based in part upon estimates, are as follows:

Rent on Pickup—\$80.00 month	3.81 day
Gasoline	2.28 day
Oil, lubrication, etc.	1.26 day
Maintenance	1.40 day

Total per day 8.75

3 men rode per trip, man cost 2.92 per day

Transportation Furnished via Pickup
July 11 to Sept. 30, 1956

Operators 91 man days
Teamsters148 man days

239 man days at 2.92 per day\$697.88

	1956	1957
Bus driver 2 hrs. O.T.	8.00	8.00
Bus rented	13.00	13.00
Gasoline	3.80	3.80
Oil, lubrication	2.00	2.00
Repair cost	6.50	6.50
	<hr/>	<hr/>
	33.30	33.72

Bus Transportation Furnished

October 1956	22 days	
November	20 days	
December	20 days	
<hr/>		
	62 days at 33.30	2,064.60
January 1957	22 days	
February	20 days	
March	21 days	
April	15 days	
<hr/>		
	78 days at 33.72	2,630.16

Isolation Pay

Teamsters

Halloway	107 days
Wren	20 days
Still	191 days
Richardson	86 days

Operators

Sherrell	83 days
Housman	56 days
Steele	78 days
Grady	19 days

"Status Quo" 640 days at 36.252,320.00

Less AGC Agreement 640 days at 1.00 640.00

Extra cost of Isolation Pay over AGC

Travel Allowances1,680.00

\$7,072.64

TOTAL AMOUNT OF DAMAGES CLAIM

Item 1—Overtime Salaries During Strike	\$13,940.28
Item 2—Office Rent, Furnishings & Engineering Equipment	1,134.73
Item 3—Transportation to Protect Property During Strike	1,156.00
Item 4—Director of Labor Relations Costs	1,294.00

Item 5—Telephone Expense	625.86
Item 6—Legal Expense	750.00
Item 7—Reemployment Costs After Strike	926.26
Item 8—Equipment Rentals	29,592.59
Item 9—Liquidated Damages	None
Item 10—Interest on Investment	1,804.68
Item 11—Loss of Profits	64,190.00
Item 12—General Administrative Ex- pense	19,257.00
Item 13—Extra Strength Concrete	675.75
Item 14—Wage Increase After Jan- uary 1, 1957	2,378.55
Item 15—Extended Time Maintain- ing General Electric Com- pany Office	547.30
Item 16—Efficiency Loss for Labor and Supplies	92,835.29
Item 17—Status Quo Transportation and Isolation	7,072.64
	<hr/>
	\$238,180.93

II.

That in accordance with the foregoing detailed information paragraph VII of the Amended Complaint of the Plaintiff herein will be amended to read as follows:

VII.

By reason of the breach by Defendants of the terms and provisions of said Labor Agreements, Exhibits "A" and "B" hereinbefore mentioned, as hereinbefore alleged, and the resulting shutdown of the operations of Plaintiff caused solely thereby the [74] Plaintiff has suffered loss and damages in the sum of \$238,180.93 for which amount the Plaintiff prays for Judgment against the Defendants In-

ternational Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 839 and International Union of Operating Engineers, Local No. 370, and each of them.

ALLEN, DeGARMO & LEEDY
and DORSEY & HAIGHT,

By /s/ GERALD DeGARMO,
Counsel for Plaintiff. [75]

EXHIBIT A

DIRECTOR OF LABOR RELATIONS
COSTS APPLICABLE TO STRIKE

April 24, 1956—

Two Round Trip Air Passage Boise-Seattle (Mr. Knaack and Tom Medlem)	\$137.50
One Round Trip Air Passage Spokane-Seattle (Mr. Sam Guess, Manager AGC)	35.86
Meals	18.25
Hotel	10.34
Taxi	10.45

August 30, 1956—

One Round Trip Air Passage Boise-Seattle	68.75
Meals	4.85
Hotel	7.00
Taxi	7.75
Telephone calls in connection thereto	237.00
Wages or Salary	756.23
Total	<hr/> \$1,294.00



Tabulation of Total Craft Hours Worked

roll—Week Ending	Millwrights Straight Time	Over Time	Laborers Straight Time	Over Time	Carpenters Straight Time	Over Time	Finishers Straight Time	Over Time	Ironworkers Straight Time	Over Time	Transients Straight Time	Over Time
1/6/57	523½	43½	147	3	96		51½	3½	96		56½	8½
1/13/57	820	44	243	3	160		83	3	200		94	14
1/20/57	536	44	202½	2½	160½	½	81½	1½	200		94	14
1/27/57	750	30	211	1	160		83	3	200		94	14
2/3/57	689	17	192		160		80		200		94	14
2/10/57	688½	24½	192		160		80		200		94	14
2/17/57	680½	36½	208		160		72		200		94	14
2/24/57	710	110	160		160		82½	2½	200		94	14
3/3/57	710½	118½	124		128		80		200		94	14
3/10/57	580	92	120		120		80		200		94	14
3/17/57	450	18	161	1	80½	½	82	2	120		96	16
3/24/57	250	18	134		80		64		120		51½	11½
3/31/57	266	25	120		80		40		120		50	10
4/7/57	184½	24½	121½	1½	40		40½	½	120		50	10
4/14/57	96		120		40		40		96		50	10
4/21/57			80		40		40				42½	2½
4/28/57			48		40		40				39	7
5/5/57												

SS:

Extra Work Reimbursed at 1957

ates (See Sheet #2).....

1,009½ 146½ 876 610½ 226 229 45 1,331½ 211½

7,225 499 1,828 12 1,262½ 1 894 16 2,363 1,286½ 211½

Tabulation of Craft Hours Worked on Reimbursed Extra Work at 1957 Rates

Extra Work	Carpenters	Concret Finishers	Laborers	Ironworkers	Operating Engineers	Millwrights	Teamsters
H25	56	64	288	16			
F13	8	16	24				
FH15				48			
FH23						176	
F19	9			40			
F20	56	8	4	8			
H30		4	4	4			
F22		8	4	12			
H45				24			
H30							
H32	24		8				
H46	30		130	51			
H44							

Extra on Pump Test

Work for Subcontractors—1957:

Invoice No. 36

37

38

39

Change Order #5—University

Plbg. & Htg.

Office Additions (Contract Work—1957)

473½	69	384	26			45
610½	226	876	229			45
					1,009½	
					(146½ O.T.)	



October 14, 1957

Item 14—Extra Cost Due to Wage Increase After January 1, 1957

Summary

Millwrights	7,225	Hrs. @	\$0.04	\$ 289.00
	499	Hrs. @	0.02	9.98
	7,225	Hrs. @	0.10	722.50
Laborers	1,828	Hrs. @	0.13	237.64
	12	Hrs. @	0.065	.78
Carpenters	1,262½	Hrs. @	0.04	50.50
	1	Hr. @	0.02	.02
	1,262½	Hrs. @	0.10	126.25
Finishers	894	Hrs. @	0.14	125.16
	16	Hrs. @	0.07	1.12
Ironworkers	2,363	Hrs. @	0.18	425.34
Teamsters	1,286½	Hrs. @	0.12½	160.81
	211½	Hrs. @	0.06¼	13.22
				<hr/> \$2,162.32
Payroll Taxes and Insurance—10%				216.23
Total				<hr/> <hr/> \$2,378.55

[Endorsed]: Filed November 5, 1957.

[Title of District Court and Cause.]

STIPULATION AND ORDER RE
PLACE OF TRIAL, ETC.

Subject to the approval of the Court, it is stipulated that this case shall be transferred for trial from Yakima to Spokane; and

It is further stipulated that this case shall first be assigned for hearing to determine the question of liability only, and if liability is found in favor of the plaintiff it shall be continued and assigned for hearing at a later date for the determination of damages.

ALLEN, DeGARMO & LEEDY
and DORSEY & HAIGHT,

By /s/ GERALD DeGARMO,
Attorneys for Plaintiff.

/s/ R. MAX ETTER,
Attorney for Defendant, International Union of
Operating Engineers, Local 370.

BASSETT, VANCE & DAVIES,
/s/ STEPHEN V. CAREY,
Attorneys for Defendants, International Brother-
hood of Teamsters, Chauffeurs, Warehousemen
and Helpers of America, et al.

Approved and so ordered this 16th day of April,
1957.

/s/ SAM M. DRIVER,
U. S. District Judge.

[Endorsed]: Filed April 16, 1957. [80]

[Title of District Court and Cause.]

DEFENDANTS' REQUEST FOR ADMISSIONS
UNDER RULE 36

As provided by Rule 36 of Rules of Civil Procedure, the defendants request that the plaintiff, within twenty (20) days after the service of these requests, make admissions of the truth of the following facts:

(1) That the contract described in paragraph IV of the plaintiff's amended complaint herein between the plaintiff and United States Atomic Energy Commission, dated November 25, 1955, covered construction work to be performed by the plaintiff exclusively within the area now known as "Hanford Atomic Products Operation."

(2) On February 18, 1943, Henry L. Stimson, the then Secretary of War, addressed a letter to the then Attorney General of the United States stating that

"It is necessary and advantageous to the interest of the United States that certain lands situated in Benton County, State of Washington, be acquired for use in connection with the establishment of the Gable Project * * *. The aforementioned lands are to be utilized for the establishment of a military reservation, and for other military uses incident thereto, and the utmost haste in expediting this project is vital to the successful prosecution of the war. It is requested that pursuant to the provisions of the

Act of Congress approved March 27, 1942 (Public Law 507-77th Congress), you procure an order of the court granting immediate possession of the aforesaid lands."

(3) In compliance with the request of the Secretary of [81] War, the Attorney General of the United States, through the United States District Attorney for the Eastern District of Washington, on February 23, 1943, caused a petition for condemnation to be filed in the above-entitled Court, entitled: "No. 128—United States of America, Petitioner vs. Clements P. Alberts, Defendant," which petition described the lands sought to be acquired by the United States for the purposes described by the Secretary of War. Said lands were identified as Area "A" in Benton County, Washington, containing 176,323 acres, more or less, and Area "D" in Benton County, Washington, containing 17,510 acres, more or less.

(4) Upon the filing of the described petition for condemnation the court, on February 23, 1943, entered its order granting the United States of America, the petitioner, the right of immediate possession of the described lands upon a proper showing that the said lands were being acquired in time of war for military, naval, or other war purposes and that immediate possession thereof was required in order that the same might forthwith be occupied, used and improved for the purposes described in the condemnation petition.

(5) On April 12, 1943, the Secretary of War addressed a letter to the Attorney General of the United States referring to the condemnation proceeding then pending and stating, in part:

“It has been administratively determined to be advantageous to the interest of the United States to amend the petition in condemnation and order of possession in order to correctly and fully describe all of the lands to be affected by this proceeding, and to further amend said petition and order to provide for the acquisition of certain existing easements for railroads in the lands involved.

“It is requested, therefore, that you take the necessary action to amend the petition and order of possession to include all of the lands described in the attached Exhibit “A” as Areas ‘A,’ ‘D’ and ‘E’ * * *.”

In that letter the lands to be acquired were described as “Hanford Engineering Works.”

(6) As requested by the Secretary of War, an amended [82] petition for condemnation was filed on April 22, 1943, describing three areas to be acquired and designated as “A,” “D” and “E.” Area “A” containing 182,723 acres, more or less, in Benton County, Washington; Area “D” containing 17,000 acres, more or less, in Benton County, Washington, and Area “E” containing 6,400 acres, more or less, in Benton, Yakima and Grant Counties, Washington, aggregating 206,123 acres, more or less.

(7) Upon the filing of the said amended petition the court, on April 22, 1943, entered its order granting the United States of America the right of immediate possession of the described lands upon a proper showing that the same were being acquired in time of war for military, naval, or other war purposes and that immediate possession was required in order that the same be devoted to the purposes described in the amended petition, namely, for "the establishment of the Hanford Engineering Project, for a military reservation and for other military uses incident thereto." ----

(8) Upon the entry of the said orders of February 23, 1943 and April 22, 1943, the United States, through the War Department, took possession of all of the described lands and thereafter acquired additional lands so that ultimately the area included in excess of 400,000 acres, the greater portion being within the exterior limits of Benton County.

(9) Following the passage of the Atomic Energy Act of 1946, the President, by Executive Order 9816, dated December 31, 1946, transferred all of the lands and property then known as "Manhattan Engineering District, War Department," to the Atomic Energy Commission which at all times since has possessed and operated the same for the production of fissionable material, as provided by the Atomic Energy Act of 1946.

(10) The area designated in the condemnation petitions as "Gable Project" and "Hanford Engi-

neering Works" and designated [83] as "Manhattan Engineering District, War Department" at the time of its transfer to the Atomic Energy Commission is the same area referred to in the plaintiff's amended complaint as "Hanford Atomic Products Operation."

(11) Immediately after the War Department took possession of the lands, as above stated, it entered into a contract with Du Pont De Nemours & Company for the construction and operation of the necessary facilities for the production of fissionable material for war purposes and after the transfer of the area to the Atomic Energy Commission that Commission entered into a contract with General Electric Company for the construction and operation of all facilities for the production of fissionable material for the purposes designated in the Atomic Energy Act of 1946.

(12) The contracts of the Du Pont Company and General Electric Company covered not only the construction and operation of facilities for the manufacture of fissionable materials but also the performance of many related engineering, architectural and research services. Those contracts also included the construction, management and operation of extensive housing and business facilities required to meet the needs of the employees, together with all necessary municipal services. The Federal Government acquired this land by purchase or condemnation and has always used it for the sole purpose of constructing and operating a plant for the

production of fissionable materials. While the Government did not elect to take exclusive jurisdiction of the area, it has controlled all ingress and egress to and from the area and only those with official business and appropriate identification and security clearance have been permitted in the area.

BASSETT, GEISNESS &
VANCE,

/s/ STEPHEN V. CAREY,
Attorneys for Defendants, Teamsters, etc., Local No.
839, Joint Council of Teamsters No. 28 and
Western Conference of Teamsters.

/s/ R. MAX ETTER,
Attorney for Defendant, International Union of
Operating Engineers, Local No. 370.

Receipt of copy acknowledged.

[Endorsed]: Filed December 13, 1956. [84]

[Title of District Court and Cause.]

ANSWERS OF MORRISON-KNUDSEN COM-
PANY, INC., A CORPORATION, PLAIN-
TIFF, TO DEFENDANTS' REQUESTS
FOR ADMISSIONS UNDER RULE 36

Comes now Morrison-Knudsen Company, Inc., a corporation, Plaintiff in the above-entitled action and in response to the Defendants' Requests for Admissions Under Rule 36 served herein on December 12, 1956, admits and states as follows:

(1) As to Request for Admission (1) admits that the Contract described in paragraph IV of the Plaintiff's Amended Complaint herein between the Plaintiff and the United States Atomic Energy Commission dated November 25, 1955, covered construction work to be performed "within the perimeter barricade at Hanford Works," which area is a part or portion of the area now known as "Hanford Atomic Products Operation," and denies all of said request except as expressly covered by the foregoing admission.

(2) As to Request for Admission (2) admits the same.

(3) As to Request for Admission (3) admits the same.

(4) As to Request for Admission (4) admits the same.

(5) As to Request for Admission (5) admits the same. [85]

(6) As to Request for Admission (6) admits the same.

(7) As to Request for Admission (7) admits the same.

(8) As to Request for Admission (8) admits the same.

(9) As to Request for Admission (9) admits that following the passage of the Atomic Energy Act of 1946, the President by Executive Order 9816, dated December 31, 1946, transferred all of the lands and property then known as the "Manhattan En-

gineering District, War Department'' to the Atomic Energy Commission which at all times since has possessed and operated the same for the purposes of and in accordance with the Atomic Energy Act of 1946, as amended by the Atomic Energy Act of 1954 and in part for the production of fissionable material, and denies all of said Request except as expressly covered by the foregoing admissions.

(10) As to Request for Admission (10) admits the same.

(11) As to Request for Admission (11) admits that immediately after the War Department took possession of the lands it entered into a Contract with Du Pont De Nemours & Company for the construction of a plant, the operation of the same, the performance of architect-engineer services, and other work and services all as directed by the United States Government, and pursuant to such Contract and directions certain fissionable materials were produced, which were used for war purposes, and after the transfer of the area to the Atomic Energy Commission it entered into a similar Contract with the General Electric Company for the construction of additional plant, the operation of facilities, the performance of architect-engineer services, and for other work and services all as directed by the Atomic Energy Commission, and pursuant to such Contract and directions certain fissionable materials were produced in accordance with the Atomic Energy Act of 1946 and as amended by the Atomic Energy Act of 1954, and denies all of said Request

except as [86] expressly covered by the foregoing admissions or by the terms and provisions of the Atomic Energy Act of 1946 and the Atomic Energy Act of 1954.

(12) As to Request for Admission (12) and the first sentence thereof incorporates by reference its answer and admissions as contained in (11) above. Admits the truth of the statements as made in the second sentence of Request for Admission (12). As to the third sentence, admits the Federal Government acquired the lands by purchase or condemnation and has always used the same for the purposes and objects set forth or covered by the Atomic Energy Act of 1946 and as amended by the Atomic Energy Act of 1954, including the production of fissionable materials. As to the fourth sentence of Request for Admission (12) states that although the United States has refused to accept either exclusive or concurrent jurisdiction over the area now known as "Hanford Atomic Products Operation" it has to the extent deemed necessary or advisable by the Atomic Energy Commission controlled ingress to and egress from certain portions of said area through the requirements of security clearance passes or permits, which requirements have been changed or altered from time to time as deemed appropriate by the Atomic Energy Commission. Other than as expressly covered by the foregoing admissions, the Request for Admission (12) and each part thereof is denied as untrue.

Wherefore, Morrison-Knudsen Company, Inc., a corporation, Plaintiff herein, verifies the foregoing admissions as true. R. B. Snow, its Assistant Secretary.

MORRISON-KNUDSEN
COMPANY, INC.,

By /s/ R. B. SNOW,
Assistant Secretary.

Subscribed and Sworn To by R. B. Snow on behalf of Morrison-Knudsen Company, Inc., Plaintiff herein, this 28th day of December, 1956.

[Seal]: /s/ GERALD DeGARMO,
Notary Public in and for the State of Washington,
Residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed December 31, 1956. [87]

[Title of District Court and Cause.]

DEFENDANTS' SUPPLEMENTAL REQUEST
FOR ADMISSIONS UNDER RULE 36

As provided by Rule 36 of Rules of Civil Procedure, the defendants request that the plaintiff, within ten days after the service of these supplemental requests, make admissions of the truth of the following facts:

Supplemental Request 1. From time to time from February 23, 1943, as the United States ac-

quired lands in Benton County and adjoining counties for use as the "Hanford Atomic Projects Operation" all the lands and facilities constituting that Project have been immune from taxation by the State of Washington and its political subdivisions, including the County of Benton.

Supplemental Request 2. As authorized by Section 9(b) of the Atomic Energy Act of 1946, As Amended (42 USCA Section 1809(b)) the Atomic Energy Commission, beginning with the school year ending June 30, 1948, has made substantial contributions in lieu of taxes to Benton County for the maintenance of its schools, but it has never made any contributions in lieu of taxes to the State of Washington or to any of its political subdivisions for governmental purposes generally.

BASSETT, VANCE & DAVIES,

/s/ STEPHEN V. CAREY,

Attorneys for Defendants, Teamsters etc., Local No. 839, Joint Council of Teamsters No. 28 and Western Conference of Teamsters.

/s/ R. MAX ETTER,

Attorney for Defendant, International Union of Operating Engineers, Local No. 370.

Receipt of copy acknowledged.

[Endorsed]: Filed June 3, 1957. [88]

[Title of District Court and Cause.]

ANSWERS OF PLAINTIFF TO DEFENDANTS' SUPPLEMENTAL REQUEST FOR ADMISSIONS UNDER RULE 36

Comes now Morrison-Knudsen Company, Inc., a corporation, Plaintiff in the above-entitled action, and for Answer to the Defendants' Supplemental Request for Admissions Under Rule 36 states:

Answer to Supplemental Request No. 1. Admits that as to such properties constituting "Hanford Atomic Projects Operation" as to which the United States of America acquired fee title, and as to such facilities located thereon as to which ownership is in the United States of America none of the State of Washington, or its various political subdivisions, including Benton County, has the power of taxation thereof.

Answer to Supplemental Request No. 2. Denies that any contributions have ever been made "in lieu of taxes" to Benton County for the maintenance of its schools pursuant to Section 9(b) of the Atomic Energy Act of 1946 as Amended (42 USCA Section 1809(b)) and admits that the Atomic Energy Commission has never made any contributions "in lieu of taxes" to the State of [89] Washington or to any of its political subdivisions for governmental purposes.

Plaintiff does state and admit, however, that the Atomic Energy Commission pursuant to the author-

ity given by Section 12a(5) of the Atomic Energy Act of 1946 and the similar provision Section 161e of the Atomic Energy Act of 1954 (42 USCA Section 2201(e)) reading as follows:

“Sec. 161 General Provisions. In the performance of its functions the Commission is authorized to * * *

“e. acquire such material, property, equipment, and facilities, establish or construct such buildings and facilities, and modify such buildings and facilities from time to time, as it may deem necessary, and construct, acquire, provide, or arrange for such facilities and services (at project sites where such facilities and services are not available) for the housing, health, safety, welfare, and recreation of personnel employed by the Commission as it may deem necessary, subject to the provisions of Section 174;”

and Contracts made in accordance therewith with School District 400 serving Richland Community, Washington, has made substantial payments to said District each year since 1946.

Wherefore, Morrison-Knudsen Company, Inc., a corporation, Plaintiff herein, verifies the foregoing Admissions as true by R. B. Snow, its Assistant Secretary.

MORRISON-KNUDSEN
COMPANY, INC.

By /s/ R. B. SNOW,
Assistant Secretary.

Subscribed and sworn to by R. B. Snow on behalf of Morrison-Knudsen Company, Inc., Plaintiff herein, this 29th day of May, 1957.

[Seal] /s/ VIRGINIA COLEMAN,
Notary Public in and for the State of Washington,
Residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed June 10, 1957. [90]

[Title of District Court and Cause.]

PLAINTIFF'S REQUEST FOR
ADMISSIONS UNDER RULE 36

As provided by Rule 36 of the Rules of Civil Procedure, the Plaintiff requests that the Defendants, within twenty (20) days after the service of these Requests, make admissions of the truth of the following facts:

(1) That under date of May 26, 1943, there was sent by Henry L. Stimson, Secretary of War, to Honorable Arthur B. Langlie, Governor of Washington, a communication, a copy of which is attached hereto as Exhibit "A," which was received by the Executive Department of the State of Washington June 1, 1943, and a copy of which was signed by the said Arthur B. Langlie as Governor of the State of Washington on June 2, 1943, and returned to the War Department.

(2) That under date of November 8, 1943, there was sent by Henry L. Stimson, Secretary of War, to Honorable Arthur B. Langlie, Governor of Washington, a communication, a copy of which is attached hereto as Exhibit "B," which was received by the Executive Department of the State of Washington November 8, [91] 1943.

(3) That under date of January 4, 1944, there was sent by Henry L. Stimson, Secretary of War, to Honorable Arthur B. Langlie, Governor of Washington, a communication, a copy of which is attached hereto as Exhibit "C," which was received by the Executive Department of the State of Washington and one copy signed by the Governor of the State of Washington on January 10, 1944, and returned to the War Department.

(4) That under date of August 16, 1944, there was sent by the Acting Secretary of War for the United States to Honorable Arthur B. Langlie, Governor of Washington, a communication, a copy of which is attached hereto as Exhibit "D," which was received by the Executive Department of the State of Washington August 22, 1944, and one copy of which was signed by the Governor of the State of Washington on August 22, 1944, and returned to the War Department.

(5) That under date of January 31, 1945, there was sent by Henry L. Stimson, Secretary of War, to Honorable Mon C. Wallgren, Governor of Washington, a communication, a copy of which is attached

hereto as Exhibit "E," which was received by the Executive Department of the State of Washington August 6, 1945, and one copy of which was signed by the Governor of the State of Washington on August 9, 1945, and returned to the War Department.

(6) That at all times since acquisition by the United States Government, the entire area located in the State of Washington known as Hanford Atomic Products Operations has been subject to the criminal code of the State of Washington and the enforcement of all law and order in the area has been under the jurisdiction and control of the duly elected sheriffs of the various counties of the State of Washington in which said area is located. [92]

(7) That at all times since acquisition by the United States Government all construction activities within the area now known as Hanford Atomic Products Operation and all labor employed within said area have been subject to the jurisdiction and supervision of the Department of Labor of the State of Washington and the safety regulations of said Department have been applied to all work and labor in said area and supervised by representatives of the State of Washington, Department of Labor.

(8) That at all times since acquisition by the United States Government all labor employed within the area now known as Hanford Atomic Products Operations has been considered to be subject to the terms and provisions and covered by the

provisions of the State of Washington Workmen's Compensation Act.

(9) That under date of December 29, 1955, there was sent by Kenneth McCaffree, Executive Secretary of the Hanford Contractors Negotiating Committee, to the Pasco-Kennewick Building & Construction Trades Council and to each of the Defendants, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 839, and International Union of Operating Engineers, Local No. 370, a communication, a copy of which is attached hereto as Exhibit "F."

(10) That at no time since December 31, 1955, has there been in force or effect a Construction Collective Bargaining Agreement covering Hanford Works or the area known as Hanford Atomic Products Operations between the Hanford Contractors Negotiating Committee and any of Defendants to this action.

(11) That at no time has Morrison-Knudsen Company, Inc. ever signed or approved in writing any agreement negotiated between any of Defendants and the Hanford Contractors Negotiating Committee.

(12) That at all times mentioned in the Amended Complaint the Plaintiff, Morrison-Knudsen Company, Inc., was and [93] it now is a corporation organized under the laws of the State of Delaware with its principal office and place of

business at Boise, Idaho, and qualified as a foreign corporation under the laws of the State of Washington.

(13) That at no time since January 1, 1956, has there been in force and effect any Agreement providing for the payment of by Plaintiff, or by the terms of which Plaintiff was obligated to make or pay, contributions toward the Health and Welfare Fund of any of Defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 839, Joint Council of Teamsters No. 28 or Western Conference of Teamsters other than the Agreement which was attached to the original Complaint of Plaintiff herein as Exhibit A.

(14) That at no time since January 1, 1956, has there been in force and effect any Agreement providing for the payment of by Plaintiff, or by the terms of which Plaintiff was obligated to make or pay, contributions toward the Health and Welfare Fund of the Defendant International Union of Operating Engineers, Local No. 370, other than the Agreement which was attached to the original Complaint of the Plaintiff herein as Exhibit B.

(15) That on the 14th day of November, 1956, there was left with Ralph Nelson, Project Office Manager of Plaintiff at Richland, Washington, by one Dan Griffith, a representative of the Defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 839, copies of the Agreement, of which

Exhibit G hereto is a photostatic copy and copies of the Compliance Agreement, of which Exhibit H hereto is a photostatic copy, with the request that said Agreement and Compliance Agreement be delivered to the University Plumbing & Heating Company, a Subcontractor of Plaintiff upon its Contract with the Atomic Energy Commission for work upon and within the Hanford Atomic Products Operation area, and which Agreement and [94] Compliance Agreement were stated to cover the Subcontract work of the University Plumbing & Heating Company within the Hanford Atomic Products Operation area under its Subcontract with Plaintiff.

ALLEN, DeGARMO & LEEDY
and DORSEY & HAIGHT,

By /s/ GERALD DeGARMO,
Attorneys for Plaintiff. [95]

EXHIBIT A

War Department
Washington

May 26, 1943.

Honorable Arthur B. Langlie,
Governor of Washington,
Olympia, Washington.

Dear Governor Langlie:

The laws of the State of Washington [An act of the legislature of Washington approved March 15,

1939 (Session Laws 1939, chap. 126, p. 357; see also sec. 8108-1 to 8108-4, inclusive, Remington's Revised Statutes of Washington, annotated, 1931 [1940 Pocket Supplement])), permit the assumption of concurrent Federal jurisdiction over lands within that State title of record to which has been acquired by the United States for military and certain other purposes.

Under section 355, Revised Statutes, as amended by the act of February 1, 1940 (54 Stat. 19), and by the act of October 9, 1940 (54 Stat. 1083; 40 U.S.C. 255), it is provided in effect that unless and until the United States has accepted jurisdiction over lands acquired or in which any interest shall have been acquired after February 1, 1940, it shall be conclusively presumed that no such jurisdiction has been accepted.

Accordingly, notice is hereby given that the United States accepts concurrent jurisdiction over all lands title of record to which has been acquired by it for military purposes within the State of Washington and over which concurrent jurisdiction has not heretofore been obtained.

It is requested that you return the inclosed copy of this letter, with an indorsement thereon over your signature stating the date of your receipt of this notice.

Sincerely yours,

/s/ HENRY L. STIMSON,
Secretary of War.

11/15/43.

The Hanford Engineer Works is excepted from this notice. See War Dept. letter of Nov. 8, 1943.

/s/ W. B. GIBSON.

One copy signed by the Governor on June 2, 1943 and returned to the War Dept. [96]

EXHIBIT B

War Department
Washington

Nov. 8, 1943.

Honorable Arthur B. Langlie,
Governor of Washington,
Olympia, Washington.

Dear Governor Langlie:

Under date of May 26, 1943, the United States accepted concurrent jurisdiction over all lands acquired within that state for military purposes, title to which had vested and over which concurrent jurisdiction had not previously been obtained.

The records of this Department indicate that title to a portion of the Hanford Engineer Works had vested in the United States prior to the above acceptance, and that jurisdiction was thus established over such area.

The War Department does not desire to exercise concurrent jurisdiction over this reservation, but

prefers that it remain under the jurisdiction of the State of Washington. It is therefore requested that your records be changed to specifically except the Hanford Engineer Works from the above acceptance, and that all interested state officials be notified to the effect that the portion of this reservation covered by the letter of May 26, 1943, should be restored to the jurisdiction of the State of Washington.

Sincerely yours,

/s/ HENRY L. STIMSON,
Secretary of War. [97]

EXHIBIT C

War Department
Washington

Jan. 4, 1944.

Honorable Arthur B. Langlie,
Governor of Washington,
Olympia, Washington.

Dear Governor Langlie:

The laws of the State of Washington [An act of the legislature of Washington approved March 15, 1939 (Session Laws 1939, chap. 126, p. 357; see also sec. 8108-1 to 8108-4, inclusive, Remington's Revised Statutes of Washington, Annotated, 1931 [1940 Pocket Supplement])] permit the assumption of concurrent Federal jurisdiction over lands within that State title of record to which has been

acquired by the United States for military and certain other purposes.

Under section 355, Revised Statutes, as amended by the act of February 1, 1940 (54 Stat. 19), and by the act of October 9, 1940 (54 Stat. 1083; 40 U.S.C. 255), it is provided in effect that unless and until the United States has accepted jurisdiction over lands acquired or in which any interest shall have been acquired after February 1, 1940, it shall be conclusively presumed that no such jurisdiction has been accepted.

Accordingly, notice is hereby given that the United States accepts concurrent jurisdiction over all lands title of record to which has been acquired by it for military purposes within the State of Washington since February 1, 1940, and over which Federal jurisdiction has not heretofore been obtained, excepting, however, from this acceptance all lands comprising the Hanford Engineer Works, which is located in the Counties of Benton, Grant, Franklin and Yakima.

Return of the duplicate copy of this letter with your indorsement thereon designating time of receipt of this acceptance by your office, would be appreciated.

Sincerely yours,

HENRY L. STIMSON,
Secretary of War.

One copy signed by the Governor on Jan. 10, 1944 and returned to the War Dept. [98]

EXHIBIT D

War Department
Washington

Aug. 16, 1944.

Honorable Arthur B. Langlie,
Governor of Washington,
Olympia, Washington.

Dear Governor Langlie:

The laws of the State of Washington (an act of the legislature of Washington approved March 15, 1939 (Session Laws 1939, chap. 126, p. 357); see also secs. 8108-1 to 8108-4, inclusive, Remington's Revised Statutes of Washington, Annotated, 1931 (1940 Pocket Supplement) permit the assumption of concurrent Federal jurisdiction over lands within that State title of record to which has been acquired by the United States for military and certain other purposes.

Under section 355, Revised Statutes, as amended by the act of February 1, 1940 (54 Stat. 19), and by the act of October 9, 1940 (54 Stat. 1083; 40 U.S.C. 255), it is provided in effect that unless and until the United States has accepted jurisdiction over lands acquired or in which any interest shall have been acquired after February 1, 1940, it shall be conclusively presumed that no such jurisdiction has been accepted.

Accordingly, notice is hereby given that the United States accepts concurrent jurisdiction over all lands title of record to which has been acquired

by it for military purposes within the State of Washington and over which Federal jurisdiction has not heretofore been obtained, excepting, however, from this acceptance all lands comprising the Hanford Engineer Works, which is located in the Counties of Benton, Grant, Franklin and Yakima.

Return of the duplicate copy of this letter, with your indorsement thereon designating time of receipt of this acceptance by your office, would be appreciated.

Sincerely yours,

/s/ [Indistinguishable]

Acting Secretary of War.

One copy signed by the Governor on Aug. 22, 1944 and returned to the War Dept. [99]

EXHIBIT E

One Copy Signed by the Governor on Aug. 9, 1945
and Returned to the War Dept.

War Department
Washington, D. C.

July 31, 1945.

Honorable Mon C. Wallgren,
Governor of Washington,
Olympia, Washington.

Dear Governor Wallgren:

The laws of the State of Washington (an act of the legislature of Washington approved March 15, 1939 (Session Laws 1939, chap. 126, p. 357); see

also secs. 8108-1 to 8108-4, inclusive, Remington's Revised Statutes of Washington, Annotated, 1931 (1940 Pocket Supplement)) permit the assumption of concurrent Federal jurisdiction over lands within that State title of record to which has been acquired by the United States for military and certain other purposes.

Under Section 355, Revised Statutes, as amended by the act of February 1, 1940 (54 Stat. 19), and by the act of October 9, 1940 (54 Stat. 1083; 40 U.S.C. 255), it is provided in effect that unless and until the United States has accepted jurisdiction over lands acquired or in which any interest shall have been acquired after February 1, 1940, it shall be conclusively presumed that no such jurisdiction has been accepted.

Accordingly, notice is hereby given that the United States accepts concurrent jurisdiction over all lands title of record to which has been acquired by it for military purposes within the State of Washington and over which Federal jurisdiction has not heretofore been obtained, excepting, however, from this acceptance all lands comprising the Hanford Engineer Works, which is located in the Counties of Benton, Grant, Franklin and Yakima.

Return of the duplicate copy of this letter with your indorsement designating time of receipt of this acceptance by your office, would be appreciated.

Sincerely yours,

/s/ HENRY L. STIMSON,
Secretary of War.

EXHIBIT F

December 29, 1955.

International Union of Operating Engineers

Local Union No. 370

310 West Clark

Pasco, Washington,

and

Pasco-Kennewick Building and Construction

Trades Council

204 West Clark

Pasco, Washington,

and

Other Local Unions Signatory to the Construction Collective Bargaining Agreement, Hanford Works, listed below.

Gentlemen:

The Hanford Contractors Negotiating Committee, on behalf of those contractors signatory to the Construction Collective Bargaining Agreement, Hanford Works, and in accordance with its letter of October 28, 1955, is exercising the right to terminate the agreement and is hereby terminating said agreement on December 31, 1955.

The Hanford contractors will not stop work on the Project as of January 1, 1956. The contractors will maintain wages and conditions in effect on December 31, 1955, until a new agreement or agree-

ments between the contractors and the unions involved can be completed. The contractors however are not proposing, nor do they intend, that any particular condition, in effect between December 31, 1955, and the time a new agreement or agreements are negotiated with the respective unions, will necessarily be a part of the new agreement or agreements.

The wage policy of the Project will remain unchanged. In accordance with past practice the Committee is willing to accept those wage scales and effective dates which currently have been negotiated by a particular craft or crafts and the association with which those unions normally negotiate, and which are prevailing in the area surrounding the Project. These wages can be placed into effect as soon as agreements are completed between the Hanford contractors and the respective union or unions.

The Hanford contractors are willing to meet, as agreed to by Mr. W. G. Shirk of the Building Trades Council, at 10:00 a.m., on Thursday, January 5, 1956, in the conference room of Building 770-B, Richland, to complete negotiation.

Very truly yours,

KENNETH M. McCaffree,
Executive Secretary.

KMM:fp

Bricklayers, Local Union No. 7
Carpenters, Local Union No. 1849

Cement Finishers, Local Union No. 478

Iron Workers, Local Union No. 14

Laborers, Local Union No. 348

Millwrights, Local Union No. 1699

Painters, Local Union No. 427

Painters (Sign), Local Union No. 1777

Roofers, Local Union No. 231

Sheet Metal Workers, Local Union No. 242

Teamsters, Local Union No. 839 [101]

EXHIBIT G

Trustees' Copy.

Eastern Washington and Northern Idaho
Teamster Construction Industry Welfare Plan

Agreement

This Agreement, entered into this 14th day of November, 1956, between University Plumbing & Heating hereinafter referred to as the "employer," and Local Union No. of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the "union,"

Witnesseth:

Whereas, the parties have entered a Labor Agreement covering certain employees of the employer; and

Whereas, the parties hereto desire to enter into a mutual welfare agreement for the benefit of the employees of the employer, now, therefore,

It Is Mutually Agreed as Follows:

I.

The employer shall pay into a fund established for the purpose of administration of certain welfare benefits and known as the Eastern Washington and Northern Idaho Teamster Construction Industry Welfare Plan the sum of 7½ cents for all compensable hours worked by any employee covered by the terms of the Labor Agreement, said payments to become effective on the first day of December, 1956, and to be made thereafter by the tenth day of each succeeding month during the term of the agreement.

II.

The employer hereby grants authority to act in his behalf to G. B. Seebeck, James Crick, Sr., and Frank M. Heathe, as Trustees, or their successors in office, to administer said fund as the representatives of the employer and full authority to act for the employer as the employers' representatives in the administration of said fund.

III.

Failure to make all payments herein provided for, within the time herein specified, shall be a breach of the Labor Agreement.

In Witness Whereof, the parties have hereunto set their hands and seals the day and date first above-written.

Employer: University Plumbing
Local Union No. 839

By..... By.....

Payment for the plan becomes effective December 1st, 1956, for all hours worked by teamster personnel during previous month of November, 1956.

Approximate Number of Covered Employees: 1.
Address of Employer: 3941 University Way, Seattle
5, Wash. [102]

Have Three Copies Signed

EXHIBIT H

Heavy and Building Construction Compliance Agreement

14th day of November, 1956.

I hereby approve, adopt and acknowledge responsibility for my adherence to the attached Agreement dated January 1, 195., between the Spokane Chapter of the Associated General Contractors of America, Inc., and Teamsters Local Unions Nos. 690, 551,

148, 556, and 839, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, covering all construction in the following territorial jurisdiction: Ferry, Stevens, Pend Oreille, Grant, Lincoln, Spokane, Adams, Whitman, Benton, Franklin, Walla Walla, Garfield, Asotin, Columbia and that portion of Okanogan, Douglas and Yakima counties lying east of the 120th meridian in the State of Washington; and Boundary, Bonner, Kootenai, Benewah, Shoshone, Latah, Nez Perce, Lewis, Clearwater and the north half of Idaho County in the State of Idaho, and shall remain in full force and effect until December 31, 195., except at modified or amended in accordance with the provisions of Article II of the Agreement.

I agree to operate all building, heavy, highway and engineering projects in the above-listed counties in the State of Washington and the State of Idaho under the terms of the Agreement, with the exception, that all disputes that may arise under such operations will be settled by the following procedure, rather than the procedure set out in Article XI of the Agreement.

Settlement of Disputes

In the event a dispute as to the proper interpretation of this Agreement or to any condition of employment not specifically covered therein cannot be satisfactorily settled on the job site, the same shall be referred to a Board of Conciliation consisting of

one person appointed by each party; the two so appointed to select a third member. This Board shall meet as soon as possible but in any event not later than seven (7) days after the dispute has been referred to them. It may also provide retroactivity not exceeding sixty (60) days and shall state the effective date. Decision by this Board shall be rendered within (20) days after the dispute is referred to them, and such decision shall be final and binding upon both parties. Pending decision of any such dispute, work shall not be suspended, it being understood and agreed that neither strikes nor lockouts shall take place during the life of this Agreement.

UNIVERSITY PLUMBING &
HEATING.

Name of the Company.

3941 University Way,
Seattle 5, Wash.

Teamsters Local Unions Nos. 690, 551, 148, 556 and
839, affiliated with the International Brother-
hood of Teamsters, Chauffeurs, Warehousemen
and Helpers of America.

.....

.....

Signed for the Company.

.....

Witness.

[Endorsed]: Filed January 17, 1957. [103]

[Title of District Court and Cause.]

DEFENDANTS' ANSWERS TO PLAINTIFF'S
REQUESTS FOR ADMISSIONS UNDER
RULE 36

The defendants answer plaintiff's requests for admissions under Rule 36 as follows:

Request 1—Admitted

Request 2—Admitted

Request 3—Admitted

Request 4—Admitted

Request 5—Admitted

Request 6—The defendants do not admit Request 6 as stated. They do admit that since operations first began in the Hanford area acts committed therein which constituted violations of Federal laws and regulations were prosecuted by Federal authorities, and acts committed therein which constituted violations of the Criminal Code of the State of Washington were prosecuted by local authorities, but, for reasons peculiar to that area, local police officers were not allowed to function within the area and persons sought to be prosecuted for violations of State law were apprehended within the area by area officials and surrendered to local authorities at the entrance to the area. [104]

Request 7—The defendants do not admit Request 7 as stated. They do admit that construction work within the Hanford area was carried on by con-

tractors in conformity with the safety regulations of the Department of Labor of the State of Washington, but special administrative procedures were adopted applicable to that area only.

Request 8—The defendants do not admit Request 8 as stated. They do admit that by special arrangements between state authorities, Federal authorities and contractors doing work within the area compensation to injured workmen and their dependents was made in conformity with the terms and provisions of the Workmen's Compensation Act of the State of Washington, but defendants state that the Compensation Act was administered within that area by special administrative procedures applicable to that area and not applicable to the State generally.

Request 9—Admitted

Request 10—Admitted, subject, however, to the qualification that between December 31, 1955 and the date of the work stoppage, referred to in the plaintiff's amended complaint, negotiations were being carried on between a committee representing interested labor unions and Hanford Contractors Negotiating Committee for a new contract covering construction work to be performed exclusively within the Hanford area.

Request 11—Defendants state that while Morrison-Knudsen Company, Inc., may not "in writing" have signed or approved any agreement negotiated between any of the defendants and Hanford Contractors Negotiating Committee, Morrison-Knudsen

did actually perform work within the area subject to the terms and conditions of contracts negotiated on behalf of the defendant unions with Hanford Contractors Negotiating Committee representing contractors, including Morrison-Knudsen.

Request 12—Admitted. [105]

Request 13—Answering Request 13 defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 839; Joint Council of Teamsters No. 28 and Western Conference of Teamsters admit that the contract in force prior to January 1, 1956, and applicable to the Hanford area, was cancelled as of December 31, 1955, by notice given by Hanford Contractors Negotiating Committee through Kenneth M. McCaffree, its executive secretary, and that no substitute contract became effective relative to said area between January 1, 1956, and the date of the work stoppage, referred to in plaintiff's amended complaint, and these defendants deny that the contract attached to plaintiff's amended complaint as Exhibit "A" had or has any application to work to be performed within the Hanford area.

Request 14—See answer to Request 13.

Request 15—Defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 839, admits that on November 14, 1956 (five months after work had been resumed following the work stoppage described in plaintiff's amended complaint), Dan Griffin was con-

nected with that defendant in the capacity of business agent, and on that date he left with Ralph Nelson the two documents, photostatic copies of which are identified in said request as Exhibits "G" and "H," with request that said documents be delivered to University Plumbing & Heating Co.

/s/ R. MAX ETTER,

Attorney for International Union of Operating Engineers, Local No. 370.

BASSETT, VANCE & DAVIES,

/s/ STEPHEN V. CAREY,

Attorneys for International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 839, et al.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed April 10, 1957. [106]

[Title of District Court and Cause.]

PLAINTIFF'S SUPPLEMENTAL REQUESTS FOR ADMISSIONS UNDER RULE 36

As provided by Rule 36 of the Rules of Civil Procedure the Plaintiff requests that the Defendants, within ten (10) days after service of these Supplemental Requests, make admissions of the truth of the following facts:

Supplemental Request for Admission No. 1. That pursuant to the provisions of Chapter 144, Laws of 1951 of the State of Washington, there was entered into between the United States of America, represented by the Atomic Energy Commission, and the Department of Labor and Industries of the State of Washington a Contract No. AT(45-1)562, of which Exhibit "A" hereto is a full, true and correct copy, including Appendix A.

Supplemental Request for Admission No. 2. That pursuant to the provisions of Sections SC-4(a) and GC-17 of the Specifications, a part of the Construction Contract dated November 25, 1955, between the United States Atomic Energy Commission and Morrison-Knudsen Company, Inc., for the "Construction of Pumping Plant Additions, 100-F and 100-H Areas; and [108] Office Additions and Modification of Vent Rooms, 100-B, 100-D and 100-F Areas at Hanford Works, Richland, Washington," as referred to in paragraph IV of the Plaintiff's Amended Complaint herein and which Specifications SC-4(a) and GC-17 read as follows:

"SC-4. Government Furnished Property, Facilities and Services

"The Commission will furnish to the Contractor, and except as otherwise specified, at no charge to the Contractor, the following equipment, materials, facilities and services, for incorporation in the work and/or use in performance of the work.

"a. Industrial Insurance and Medical Aid Industrial insurance and medical aid, in accordance

with the Industrial Insurance Law and Medical Aid Act of the State of Washington, and covering operations at the site of the Hanford Works, will be afforded at no cost to the Contractor and his subcontractors as set forth in paragraph GC-17, subparagraph b, of the General Conditions. (Liability insurance shall be maintained by the Contractor, at his own expense, in accordance with subparagraph c of paragraph GC-17 of the General Conditions. Subparagraph a of paragraph GC-17 of the General Conditions is not applicable and shall be disregarded.)”

“GC-17. Insurance

“Insurance protection covering operations at the site of Hanford Works will be afforded or required of the Contractor and his subcontractors to the extent provided by Paragraph SC-4, a, of the Special Conditions, under one of the following:

“a. The Contractor before commencing the work shall be qualified under the Workmen’s Compensation Laws of the State in which the work is to be done and shall at all times comply with the provisions of said laws and shall maintain such Workmen’s Compensation or Employer’s Liability Insurance as will protect the Contractor and the Commission from any and all risks and from any and all claims under such Workmen’s Compensation Laws.

“b. The Commission will afford Industrial Insurance and Medical Aid. In accordance with the

Industrial Insurance Law and Medical Aid Act of the State of Washington, and covering all of the Contractor's employees who are engaged in work contemplated by this contract, the coverage under this paragraph extends to any claim cognizable under the Industrial Insurance Law and Medical Aid Act of the State of Washington, notwithstanding the fact that the claim may be filed in a jurisdiction other than the State of Washington. In the event a claim is filed in a jurisdiction other than the State of Washington, the Commission will [109] reimburse to the Contractor the amount required to be paid by the Contractor to satisfy the award made in such foreign jurisdiction.

“(1) In order for the Commission to properly administer the insurance afforded by this subparagraph, the Contractor agrees to:

“(a) Furnish the Commission with such payroll records as are required under the Industrial Insurance Law and Medical Aid Act of the State of Washington, and

“(b) As soon as practicable furnish the Commission for administration of the insurance coverage provided hereunder and for transmission to the State of Washington, Department of Labor and Industries, accident reports, on Department approved Forms with respect to all claims concerning accidental injury or occupational diseases alleged to have occurred in the course of the work of the

Contractor under this contract. Such report shall be accomplished by written statements by or on behalf of the claimant's supervisor. The Contractor shall, at the Commission's request, furnish such other related papers or documents as may be needed for the proper administration of or handling of any judicial, quasi-judicial or administrative proceedings with respect to the insurance provided for herein or in connection with claims cognizable hereunder.

“(c) Co-operate with the Commission in the disposition or settlement of any claim or loss arising in connection with the coverage provided under this subparagraph b of Paragraph GC-17, including assistance in any investigation, hearing or proceeding connected with such claim or loss, and including the prosecution or defense in the Contractor's own name, if required by the Commission, of appropriate proceedings for the appeal or review of administrative, judicial or quasi-judicial determination with respect to any such claims or losses, subject to the direction and control of the Commission; provided, however, that the Commission, at its option, may furnish counsel to represent the Contractor, at no cost to Contractor, and, provided further that if the Commission does not furnish such counsel, the Commission will bear the cost of reasonable counsel fees and counsel expenses incurred by the Contractor, and in any event will bear the cost of attendance of witnesses and court costs, all as approved by the Commission, in any case where the Commission re-

quires the Contractor to prosecute or defend the actions or proceedings above mentioned.

“(d) Save and hold harmless the Commission and its authorized representatives from any failure on the part of the Contractor to co-operate and furnish any available witness, notice, paper or document, which failure shall result in a loss to the Commission or its authorized representatives.

“(e) The Contractor will incorporate in his subcontracts, involving operations at the site of the Hanford Works, provisions similar to those in this subparagraph b of Paragraph GC-17. [110]

“(2) In the event the Commission finds it necessary to terminate the insurance provided above, the Commission agrees to give the Contractor written notice reasonably in advance of such termination.”

the workmen employed by Plaintiff upon the Project at Hanford Works, some of whom were members of the Defendant Teamsters Union, Local No. 839, and some of whom were members of the Defendant Operating Engineers, Local No. 370, were covered for industrial insurance and medical aid under the Industrial Insurance Act and Medical Aid Act of the State of Washington, and that said quoted provisions are true and correct quotations from said Construction Contract.

Supplemental Request for Admission No. 3. That as a part of the Construction Contract dated November 25, 1955, between the United States Atomic Energy Commission and Morrison-Knudsen Com-

pany, Inc., for the "Construction of Pumping Plant Additions, 100-F and 100-H Areas; and Office Additions and Modification of Vent Rooms, 100-B, 100-D and 100-F Areas at Hanford Works, Richland, Washington," there was included in the Specifications thereto, as a part of Supplement A to General Provisions-Standard Form 23A a paragraph reading as follows:

"32. Prevailing Wage Rates and Allowances.

"During the life of the Hanford Works Agreement, the Contractor agrees to pay laborers and mechanics engaged in the work hereunder at Hanford Works the scale of wages and allowances prevailing at Hanford Works (including all terms of any modification thereof) as determined by the Commission; provided, however, that in no case shall the Contractor be required to pay less than the applicable schedule of rates predetermined by the Secretary of Labor pursuant to the Davis Bacon Act and attached as Section 3 of Part IV, Wage Rates and Allowances of the Specifications. Sections 1 and 2 of Part IV set forth the scale of prevailing wages and allowances determined by the Commission as of the date indicated therein. There shall be no adjustment in the contract price, nor shall the Contractor be entitled to any additional compensation, in event of any increase or decrease in prevailing wages or allowances. 'Allowances' as used herein shall be construed to mean all payments made to or for the account of laborers or mechanics, other than wages. The Contractor shall cause appropriate pro-

visions to be inserted in all subcontracts whereby the subcontractors will be required to conform to the foregoing clause." [111]

Supplemental Request for Admission No. 4. That during portions of the period from January 1, 1953, to and including the date of June 6, 1956, there were in effect from time to time the following-mentioned Contracts between the United States Corps of Engineers and Various Contractors as named:

Contract No. DA-45-164-eng-2552 with the Power City Electric Company of Spokane, Washington, for Power Facilities.

Contract No. DA-45-164-eng-2557 with the Columbia Asphalt Company of Yakima, Washington, for Forward Access Roads.

Contract No. DA-45-164-eng-2566 with Hopkins Construction Company for the construction of Igloos.

Contract No. DA-45-164-eng-2571 with the L. A. Hoffman Company for the construction of a Nike site and base.

Contract No. DA-45-164-eng-2580 with Sound Construction Company for the Construction of Main Camp Facilities.

Contract No. DA-45-164-eng-2923 with Hopkins Construction Company for the construction of a Ferry Landing Access Road.

Contract No. DA-45-164-eng-2925 with Hopkins Construction Company for the construction of a Battalion Headquarters Building.

each of which Contracts called for the performance of work wholly within the Hanford Works Area and that portion thereof enclosed by the Barricade and that members of the Defendant Teamsters, Local No. 839, were employed upon many of said Projects under the terms and provisions of the Labor Agreement attached to the original Complaint of the Plaintiff herein as Exhibit A, and members of the Defendant Operating Engineers, Local No. 370, were employed upon many of said Projects under the terms and provisions of the Labor Agreement attached to the original Complaint of the Plaintiff herein as Exhibit B.

ALLEN, DeGARMO & LEEDY,
and DORSEY & HAIGHT,

By /s/ GERALD DeGARMO,
Counsel for Plaintiff. [112]

EXHIBIT A

Contract No. AT(45-1)—562

This Agreement, entered into this 17th day of December, 1952, effective the 1st day of January, 1953, between the United States of America, represented by the Atomic Energy Commission (here-

inafter called the "Commission") and the Department of Labor and Industries of the State of Washington, represented by the Director thereof (hereinafter called the "Department"),

Witnesseth That:

Whereas, the Commission has heretofore entered into or will hereafter enter into certain contracts for construction of certain plants and facilities and work related thereto at the site of Hanford Works in or near Richland, Washington, and

Whereas, the extraordinary conditions and circumstances at the said Hanford Works are deemed by the Department to justify the adoption and promulgation of a Defense Projects Insurance Rating Plan providing for Industrial Insurance and Medical Aid benefits to injured workmen, their families and dependents under the terms and conditions hereinafter set forth, and

Whereas, Chapter 144, Laws of 1951 (uncodified) provides that the Department, upon the request of the Chairman of the United States Atomic Energy Commission, may approve or promulgate defense projects rating plans providing for insurance with respect to defense or other projects in the national interest, and

Whereas, the Chairman of the Commission has stated that a defense projects insurance rating plan providing for compensation insurance to employees of certain Commission contractors will effectively

aid the national interest and has requested the Department to approve a defense projects insurance rating plan providing for insurance for employees of such contractors as the Commission may desire to be insured hereunder, and

Whereas, the promulgation of such plan will require the performance of certain undertakings on the part of each of the parties hereto, as hereinafter set forth,

Now, Therefore, in consideration of the premises and the mutual undertakings and obligations contained herein, the parties hereto have agreed, and do hereby agree, as follows: [113]

Defense Projects Insurance Rating Plan

1. Contractors engaged in the construction of plants or facilities and contractors engaged in work related thereto at the site of the Hanford Works, with respect to whom the Commission advises the Department the coverage of the Defense Projects Insurance Rating Plan hereinafter set forth is to apply, shall be deemed to be insured under this Agreement; provided, however, that compensation awards and benefits shall be payable hereunder only with reference to claims of workmen (and their families and dependents) injured in the course of employment which result from work performed at the site of Hanford Works by contractors insured hereunder.

2. The Industrial Insurance and Medical Aid Acts of the State of Washington shall apply with

full force and effect with respect to all contractors (hereinafter referred to as "employers") and all workmen and their families and dependents as are or may be afforded coverage hereunder, except that under this Plan certain obligations and requirements of said Industrial Insurance and Medical Aid Acts which otherwise might be imposed upon employers are hereby modified expressly or by necessary inference and certain obligations in lieu thereof are hereby assumed by the parties hereto. Where and to the extent such obligations and requirements are assumed by virtue of this Agreement, employers insured hereunder are exempt from such obligations and requirements under said Industrial Insurance and Medical Aid Acts.

3. Deposit.

The Commission shall deposit, in a bank to be selected by the Department and approved by the Commission, separate funds to be maintained in the name of the Department, designated as follows:

(a) Contract No. AT(45-1)-562, Industrial Insurance Law Account.

(b) Contract No. AT(45-1)-562, Medical Aid Act Account.

(c) Contract No. AT(45-1)-562, Pension Reserve Fund Account.

The initial deposit in Account (a) shall be Twenty-five Thousand Dollars (\$25,000).

The initial deposit in Account (b) shall be Ten Thousand Dollars (\$10,000). [114]

Deposits in Account (c) shall be made upon direction of the Department and in such amount or amounts as will guarantee full payment of all pension awards made by the Department in accordance with the pension schedules of the Industrial Insurance Act or such increased awards as may hereafter be enacted by the legislature.

The Accounts created in accordance with this paragraph and all deposits by the United States into said Accounts, as well as any other Accounts, Funds or deposits subsequently created or made under any provision of this contract or any amendments thereto, shall be regarded by the parties hereto as trusts created and maintained for the benefit of injured workmen, their families and dependents; title to all such monies shall vest in the Department, as trustee, at the time of deposit thereof into said Accounts.

All the above Accounts shall be maintained in the foregoing amounts until such time as the Department shall notify the Commission in writing of an assessment predicated and based upon one or more of the eventualities set forth in subparagraphs (a) through (e) below:

(a) The entry by the Department and evidence of disbursements in accordance therewith of an award for temporary total, temporary partial or permanent partial disability under the provisions and schedules of the Industrial Insurance Act. Check for this purpose shall be drawn against Account (a).

(b) The entry by the Department of an award in a case involving permanent and total disability. Check for this purpose shall be drawn against Account (c).

(c) The entry by the Department of an award in a death case, providing for payments to dependents qualifying for pension payments in accordance with the Industrial Insurance Act. Check for this purpose shall be drawn against Account (c).

(d) Payments and expenditures made by the Department for medical services to injured workmen in accordance with the provisions of the Medical Aid Act. Check for this purpose shall be drawn against Account (b).

(e) Expenditures by the Department for services and expenses in accordance with paragraph 9, hereof. Check for this purpose shall be drawn against Account (a).

Upon notice of assessment by the Department predicated and based upon one or more of the eventualities set forth in subparagraphs (a) to (e) of this paragraph or upon [115] notice by the Department of any adjustments in amount as may from time to time be necessary, the Commission shall make prompt deposit into the appropriate Account the amount of any such assessment or adjustment. Funds deposited in Account (c) in accordance with the provisions of subparagraphs (b) and (c) of paragraph 2, hereof, shall be deposited at such interest assumption rate as may be provided for in

the Industrial Insurance Act at the time such pensions are established.

The Commission will not be under any cost or expense with respect to future pension increases to then existing pensioners which may be authorized to be paid by the State of Washington; provided, however, that the Commission will bear the expense of future increases which are authorized by the Legislature of the State of Washington to be paid to any pensioner whose pension has arisen as a result of an injury sustained in the course of extra hazardous employment and from employment by an employer covered by this agreement if at the date of the injury (or first day of disability in occupational disease cases) out of which such pension arises, such employer was not legally obligated to pay business and occupation taxes to the State of Washington solely by reason of Section IX (b) of the Atomic Energy Act.

4. Withdrawals: Withdrawals from the bank accounts provided for in paragraph 2, hereof, shall be by check issued by the Department and shall be for the sole and express purpose of making compensation payments to workmen injured in the course of employment at the site of Hanford Works (or their families or dependents in case of death) or to pay the cost of medical aid services incident thereto or to pay administrative expenses.

Any such withdrawal checks shall be signed by any two of the following persons or other persons

agreed to be the parties hereto in writing, who shall be appropriately bonded to the parties hereto for faithful performance in an amount not less than \$10,000 each: George Glenn, Maxine Daly, Charlotte Miller and Grace Reeder.

5. (a) As soon as possible after October 1 of each year the Department shall cause the State Insurance Commissioner to expert Account (c) to ascertain its standing as of October 1 of that year, and the relationship of its outstanding annuities at their then value to the cash on hand or at interest belonging to that Account. The Department shall promptly report the result of the examination to the Commission in writing not later than December 31 following. If the report shows that there was on said October 1, in the Account (c), in cash or at interest, a greater sum than the then annuity value of the outstanding pension obligations of that Account, the surplus shall be forthwith turned over to the Commission. But, if the report shows the contrary condition of the Account, the deficiency shall be forthwith made good by a deposit of such sums by the Commission as directed by the [116] Department.

(b) It is agreed that the Department shall keep accurate accounts of Account (c) and the investment and earnings thereof, to the end that, as nearly as possible, the total Account (c) shall at all times be properly and fully invested, consistent with current demands by the Department for pension or

lump sum payments payable by the Department in accordance with this Agreement.

(c) Whenever in the judgment of the parties hereto there shall be in said Account (c) funds in excess of that amount deemed by the parties to be sufficient to meet current expenditures properly payable therefrom in accordance with the pension schedules of the Industrial Insurance Act, the Commission may authorize the Department to direct the State Finance Committee to invest such excess funds in registered U. S. government securities. Such securities shall be held by and remain in the custody of such party or parties or the State Treasurer and at such place or places as may be agreed upon by the parties hereto.

6. Audit of Funds. All transactions involving the Accounts provided for in this Agreement shall be subject to audit by the Commission at any and all times.

7. Examination of Records.

(a) The Department agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under this contract, have access to and the right to examine any directly pertinent books, documents, papers and records of the Department involving transactions related to this contract.

(b) The Department further agrees to include in all its subcontracts hereunder a provision to the

effect that the subcontractor agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under this Agreement with the Commission, have access to and the right to examine any pertinent books, documents, papers, and records of such subcontractor involving transactions related to the subcontract. The term subcontract as used herein includes purchase orders.

(c) Nothing in this Agreement shall be deemed to preclude an audit by the General Accounting Office of any transaction under this contract.

8. Warrant Registers and Payroll Reports.

(a) The Department will furnish to the Commission two copies of its Warrant Register at least once each month during the period of this Agreement. The Warrant Registers thus furnished will be used by the Commission for audit and control purposes.

(b) On or before the twenty-fifth day of each January, April, July and October occurring during the period of this Agreement, the Commission will procure from each [117] contractor then insured hereunder and will furnish the Department, or will require such contractors directly to furnish the Department, true and accurate payrolls and reports as to the aggregate number of workman hours during which workmen were employed by him during the preceding calendar quarter. The "nature of work"

will be shown on each such report as "work under Contract No. AT(45-1)-562."

9. Administrative Costs and Expenses. In consideration of the services rendered by the Department under this Agreement and in order to assure compliance with national security requirements, the Department shall assign one or more specific employees to administer claims and other matters relating to this Agreement. Such employees shall be subject to the approval of the Commission but it is expressly agreed that such employees are employees of the Department for all intents and purposes whatsoever.

10. Reports of Accidents. Because of the necessity for safeguarding against disclosure of restricted data, the Department agrees to accept descriptions of accidents furnished by employers even though full details may not be given. Because of such security requirements, all notices of Award, Orders, notices of appeal, correspondence or other material relating to any and all claims cognizable hereunder will be addressed by the Department to the particular employer concerned, care of the Commission, Box 550, Richland, Washington. The Department likewise understands that, for security and other control purposes, all Accident Reports and other material furnished by employers or contract physicians and hospitals, if any, will be required to be routed to the Department through the Commission. The Commission will endeavor to assure that the Department will be provided with sufficient

information to enable it properly to perform its functions. Should the Department desire additional information with respect to any case, the matter will be taken up through conference and a solution sought which will protect the interests of all persons or parties concerned.

11. (a) It is understood and agreed that coverage under this Agreement may extend to designated prime contractors of the Commission and their designated lower tier contractors and that wherever in this Agreement the word "employer" is used it may be construed as applying to such prime contractors of the Commission and their lower tier contractors.

(b) It is further understood and agreed that the United States of America and the employers named as insured under this Agreement shall be considered as persons aggrieved having the right to appeal to the Board of Industrial Insurance Appeals and to the courts under the Workmen's Compensation Statutes and other applicable law. It is provided, however, that neither the Commission nor any such employer thereof will resort to use of informal procedures permitting protests of Department publication and mailing of such Orders. [118]

12. In order that the Commission may fulfill necessary audit and control functions, the Department agrees to furnish copies in triplicate of all Orders, pertinent correspondence, medical reports, etc., relating to all claims cognizable under this

Agreement. The Commission agrees in turn to route copies thereof to employers concerned.

13. Medical Aid Contributions.

Employees of employers insured hereunder, insofar as they may be engaged in work at the site of Hanford Works, shall not be required to contribute to the Medical Aid Act account created hereunder until such time as a base rate has been established by the Department and until such time thereafter as the Commission establishes payroll deduction procedures governing employers insured hereunder.

14. Anti-discrimination.

The Department, in performing the work required by this Agreement, shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The Department shall cause provisions similar to the foregoing to be inserted in all subcontracts under this Agreement.

15. Covenant Against Contingent Fees.

The Department warrants that no person or selling agency has been employed or retained to solicit or secure this Agreement upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Commission the right to annul the Agreement without liability or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or con-

tingent fee. This warranty shall not apply to commissions payable by the Department upon contracts or sales secured or made by bona fide employees of the Department or through bona fide established commercial or selling agencies maintained by the Department for the purpose of securing business.

16. Officials Not to Benefit.

No member of or delegate to Congress or resident commissioner shall be admitted to any share or part of this Agreement or to any benefit that may [119] arise therefrom, but this provision shall not be construed to extend to this Agreement if made with a corporation for its general benefit.

17. Disclosure of Information.

It is understood that disclosure of information relating to the work contracted for hereunder to any person not entitled to receive it, or failure to safeguard all secret, confidential and restricted matter that may come to the Department or any person under its control in connection with the work under this Agreement, may subject the Department, its agents, employees and subcontractors to criminal liability under the laws of the United States. See the Atomic Energy Act of 1946 (Public Law 585-79th Congress). See also Title 1 of an Act approved June 15, 1917, (40 Stat. 217; 50 U. S. C. 31-42) as amended by an Act approved March 28, 1940 (54 Stat., Chap. 79); and the provisions of an Act approved January 12, 1938 (52 Stat. 3; 50 U. S. C., 45-45d), as supplemented by Executive Order No. 8381, March 22, 1940, 5 F.R. 1147.

The Department agrees to conform to all security regulations and requirements of the Atomic Energy Commission. Except as the Commission may authorize, in accordance with Section 10 (b) (5) (B) of the Atomic Energy Act of 1946, the Department agrees not to permit any individual to have access to restricted data until the Federal Bureau of Investigation shall have made an investigation and report to the Commission on the character, association, and loyalty of such individual and the Commission shall have determined that permitting such person to have access to restricted data will not endanger the common defense or security. The term "restricted data" as used in this section means all data concerning the manufacture or utilization of atomic weapons, the production of fissionable material, or the use of fissionable material in the production of power, but shall not include any data which the Commission from time to time determines may be published without adversely affecting the common defense and security. The Department will not, however, permit any alien employed or to be employed by it to have access to classified documents, drawings, specifications, and "restricted data" without the written consent beforehand of the Commission. The Department shall insert in all subcontracts under this Agreement provisions making the text of this article applicable to such subcontracts. [120]

18. This agreement shall expire 5 years after the effective date hereof; provided, however, that the parties may agree in writing to extend such 5

year period; and provided, that this agreement may be terminated by either party by giving 6 months notice to the other party; and provided, further, that this agreement may be terminated at any time mutually agreed upon by the parties hereto. It is the intention of the parties that the provisions of this agreement shall not extend or apply to any claims arising out of work performed subsequent to the date of expiration or termination of this agreement as aforesaid or after the Commission ceases to operate and manage the Hanford Works. It is the intention of the parties that paragraphs 1 (except that the Commission will no longer designate employers to be deemed insured hereunder), 2, 4, 5, 6, 7, 11, 12, 14, 15, 16, 17, 19, 20, 21, shall be of continuing effect, insofar as such paragraphs are applicable, and together with the provisions set forth hereinafter shall govern the rights and duties of the parties after such expiration or termination or after the Commission ceases to operate and manage the Hanford Works.

(a) The Department agrees to carry on the defense of all claims, suits and legal proceedings pending or which may be instituted subsequently against the Department or employers insured hereunder in accordance with the provisions of the Industrial Insurance and Medical Aid Acts of the State of Washington appertaining to or in connection with the work of such employers at Hanford Works; and the Department shall assume responsibility for the payment of any and all pensions and awards thereto-

fore or thereafter made pursuant to said Industrial Insurance and Medical Aid Acts.

(b) In order to provide the Department with sufficient funds to enable it to carry out the provisions of this paragraph, the Commission shall establish and maintain in the name of the Department in a bank to be selected by the Department and approved by the Commission a reserve fund in such amount as will be deemed by the Department from time to time to be necessary for performance of the obligations assumed by the Department under this paragraph. The sole purposes of this fund will be to provide for payment in full by the Department of all pensions and awards, both past and future, provided for in the schedules of the [121] Industrial Insurance and Medical Aid Acts or any amendments thereto and resulting from work of employers insured hereunder and for reimbursement to the Department of expenditures made and to be made by the Department for services and expenses directly attributable to carrying out the provisions of this paragraph.

(c) Amounts at such time remaining in Accounts (a), (b) and (c) under paragraph 2, shall be applied toward the reserve fund established under subparagraph (b) of this paragraph. Should the total of these Accounts be insufficient to create the reserve fund required by the Department the balance necessary will be deposited into said reserve fund by the Commission. Should the contrary situation exist, the Department will immediately refund

to the Commission the excess of the total of Accounts (a), (b) and (c) over that amount necessary to establish the reserve fund required by the Department. However, nothing in this subparagraph (c) shall be construed as limiting the right of the Department to require further deposits by the Commission or its assigns or successors if the fund initially created under this paragraph proves to be insufficient to permit the Department to carry out the provisions of subparagraph (a) of this paragraph.

(d) Should the amount or amounts required to be deposited by the Commission for the creation of or replenishment of the reserve fund established under the provisions of this paragraph at any time prove to be in excess of the sums which will eventually be required for the purposes of subparagraph (a) of this paragraph, the Department will promptly refund to the Commission or its assigns or successors, if any, the amount of such excess.

19. The Department reserves the right further to approve or direct changes or modifications of this Agreement in accordance with Chapter 144, Laws of 1951.

20. By virtue of the authority contained in Chapter 144, Laws of 1951, the foregoing Defense Project Insurance Rating Plan is hereby approved by the Department. Performance hereunder by the Commission shall be deemed and shall constitute full compliance by all employers insured hereunder with all provisions and requirements of the In-

dustrial Insurance and Medical Aid Acts of the State of Washington as may be affected expressly or by necessary inference by the provisions of this Agreement. [122]

21. This Agreement is entered into on behalf of the Commission pursuant to the authority conferred by the Atomic Energy Act of 1946 and the First War Powers Act of 1941, both as amended.

In Witness Whereof, the parties hereto have set their hands and seals to this Contract No. AT(45-1)-562.

THE UNITED STATES OF AMERICA ACTING
THROUGH THE ATOMIC ENERGY COM-
MISSION,

By /s/ DAVID F. SHAW,
Manager.

THE DEPARTMENT OF LABOR AND IN-
DUSTRIES OF THE STATE OF WASH-
INGTON,

By /s/ A. M. JOHNSON,
Director.

Approved:

OFFICE OF ATTORNEY GENERAL, STATE
OF WASHINGTON,

By /s/ BERNARD A. JOHNSON,
Assistant Attorney General.

Dated: 12/17/52. [123]

Appendix "A" to Contract No. AT(45-1)-562

1. Administrative expense payments to the Department in accordance with Paragraph 9, of the contract shall be payable by the Commission each month; the Commission's obligation to make such payments shall commence on the first day of the first month in which ten or more claims cognizable under the contract are reported to the Department. It is provided, however, that in addition to actual salaries the Commission will reimburse the Department for such other and reasonable incidental expenses as may be attributable to services performed in accordance with Paragraph 9.

2. The Department agrees that the first of its employees assigned to the administration of claims and other matters under the provisions of Paragraph 9, shall be one of the employees presently assigned to duties under General Electric's Contract No.W-7412-eng-25. The Department further agrees that the number of employees assigned under the said General Electric Contract and General Electric's administrative expense payments shall be correspondingly reduced and that when practicable further transfers of employees from one contract to another and corresponding reductions in General Electric's obligations with respect to administrative expense payments shall be made.

Subsequent adjustments in the manner and/or amount of administrative expense payments will be by agreement of the parties and will depend upon increases or decreases in the Department's ad-

ministrative load with respect to claims filed under this contract.

3. In consideration of administrative expense allowances payable under Paragraph 9, of Contract No. AT(45-1)-562 and Paragraph 1, of this Appendix, the Department agrees to provide three copies of all Orders of Award or adjudication, medical examination reports, statements, essential correspondence, etc., with reference to all claims cognizable under Contract No. AT(45-1)-562. The Department also agrees that it will make no payment to any claimant or beneficiary before the seventh day following the date of mailing of any Order of Award or adjudication to the Commission and/or employers insured hereunder.

4. In order to facilitate Department handling of claims hereunder, the Commission agrees that employers insured under Contract No. AT(45-1)-562 will, where reasonably possible, provide the Department with data supplementary to that contained in Accident Report forms; such supplementary data shall, as may be appropriate to particular cases, consist of detailed medical statements of fact and conclusions and statements by nurses, witnesses, supervisors or other persons with knowledge of pertinent circumstances. [124]

5. The Department agrees to provide the Commission informally, by letter or telephone call reasonably in advance of publication of Orders of Award or adjudication, notice with respect to any award for permanent total or permanent partial

disability which equals or exceeds 25% of the statutory maximum for unspecified disabilities or 25% of the whole statutory value of any specified member or organ, not including fingers or toes.

6. The Department agrees that it will consult with the Commission with respect to all phases of claims handling and adjudication of any and all claims involving hazards peculiar in kind or degree to the Hanford Works.

7. The Commission agrees to do such things as are reasonably practicable by way of providing assistance to the Department with respect to field investigations by Department investigators, interviews with witnesses, etc.

8. Upon reasonable notice to the Commission's Office of Safety or Office of Assistant General Counsel, Insurance Section, the Commission will arrange for inspections and other business visits of Department safety or other personnel to construction work sites within the Hanford Works barricaded area; provided, however, that it is understood by the parties hereto that nothing contained herein shall be construed as having applicability to any portion of such work as may now or hereafter be classified as an area of restricted access in accordance with standards and regulations of the Commission derived from the Atomic Energy Act of 1946 as amended.

9. If experience under Contract AT(45-1)-562 and this Appendix is deemed by the parties thereto

to warrant incorporation of procedures for use of "short-form" Accident Report forms under certain circumstances, the use of such forms shall commence upon any date agreed upon by the parties.

10. It is understood and agreed that this Appendix "A" is hereby made a part of Contract No. AT(45-1)-562 by this provision.

/s/ D.F.S.,

/s/ A.M.J.,

/s/ B.A.J.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 10, 1957. [125]

[Title of District Court and Cause.]

DEFENDANTS' ANSWERS TO PLAINTIFF'S
SUPPLEMENTAL REQUESTS FOR AD-
MISSIONS

Defendants answer plaintiff's supplemental requests for admissions under Rule 36 as follows:

Answer to Supplemental Request No. 1: Admitted.

Answer to Supplemental Request No. 2: Plaintiff's counsel have submitted to defendant's counsel a document purporting to be a true copy of a construction contract dated November 25, 1955, between the plaintiff and United States Atomic

Energy Commission. Subject to proof at the trial that the document so submitted is in fact a correct copy, the defendants admit that the contract dated November 25, 1955, described in paragraph IV of the plaintiff's amended complaint, contained the several provisions quoted in this request.

Answer to Supplemental Request No. 3: Subject to the same reservation, the defendants admit the accuracy of the quotation contained in this request.

Answer to Supplemental Request No. 4: The defendants admit that from time to time during the period from January 1, 1953, to and including June 6, 1956, the United States Corps of Engineers had in effect contracts with various contractors for the performance of work wholly within the Hanford Works Area and the portion thereof enclosed by the barricade. The defendants [126] are unable to identify the particular contracts indicated in this request.

The defendant Teamsters Local 839 admits that certain of its members were employed on some of said projects during that period, but deny that they were employed under the contract dated December 19, 1955, a copy of which is attached to the plaintiff's original complaint as Exhibit A.

The defendant Operating Engineers Local No. 370 admits that certain of its members were employed on some of said projects during that period, but deny that they were employed under the contract of December 24, 1955, a copy of which is at-

tached to the plaintiff's original complaint as Exhibit B.

/s/ R. MAX ETTER,

Attorney for Defendant, International Union of
Operating Engineers, Local No. 370.

BASSETT, VANCE & DAVIES,

/s/ STEPHEN V. CAREY,

Attorneys for Defendants, Teamsters, etc., Local No.
839, Joint Council of Teamsters No. 28 and
Western Conference of Teamsters.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 6, 1957. [127]

[Title of District Court and Cause.]

STIPULATION RE DISMISSAL OF JOINT
TEAMSTERS No. 28 AND WESTERN CON-
FERENCE OF TEAMSTERS

This cause came on regularly for trial on June 10, 1957, all parties appearing by their respective attorneys of record; counsel for Joint Council of Teamsters No. 28 and Western Conference of Teamsters challenged the jurisdiction of the Court and moved to dismiss this action as to each of said defendants and the matter having been argued by counsel and taken under consideration by the Court, the Court on convening of Court on June 11, 1957, announced that said challenge to the jurisdiction and said motion to dismiss as to said two defendants should be granted; and thereafter the case

proceeded for the trial of the issues of liability as between the plaintiff and the remaining defendants, Engineers Local 370, and Teamsters Local 839, and

Whereas, for procedural reasons it is desirable that the entry of a formal judgment dismissing the action as to Joint Council of Teamsters No. 28 and Western Conference [128] of Teamsters be deferred until all issues shall have been decided, It Is Stipulated that the entry of a formal order or judgment dismissing Joint Council of Teamsters No. 28 and Western Conference of Teamsters be postponed and when a final judgment is entered it shall dismiss the action as to said two defendants in accordance with the oral decision of the Court announced on June 11, 1957, without prejudice to the plaintiff's right to appeal.

Dated this 19th day of June, 1957.

ALLEN, DeGARMO & LEEDY,
and DORSEY & HAIGHT,

By /s/ GERALD DeGARMO,
Attorneys for Plaintiff.

/s/ STEPHEN V. CAREY,
Attorney for Joint Council of Teamsters No. 28 and
Western Conference of Teamsters.

Approved this 19th day of June, 1957.

/s/ SAM M. DRIVER,
United States District Judge.

[Endorsed]: Filed June 19, 1957. [129]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF
LAW UPON ISSUE OF LIABILITY

This Cause having come on regularly for trial on the 10th day of June, 1957, before the undersigned Judge of the above-entitled Court, sitting at Spokane within said District pursuant to the written Stipulation of the parties hereto, through their respective counsel of record, that the cause be "transferred for trial from Yakima to Spokane" and that said cause be first "assigned for hearing to determine the question of liability only, and if liability is found in favor of the Plaintiff it shall be continued and assigned for hearing at a later date for the determination of damages," which Stipulation of the parties was approved by the Court and Plaintiff Morrison-Knudsen Company, Inc., a corporation, having appeared at said hearing by representatives and witnesses and having been represented by Gerald DeGarmo and Harold J. Hunsaker of Allen, DeGarmo & Leedy and Dorsey & Haight, its counsel of record, the Defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 839 (which will hereafter for sake of brevity be referred to [131] merely as Teamsters Local No. 839), having appeared by representatives and witnesses and having been represented by Stephen V. Carey, of Bassett, Vance & Davies, its counsel of record, the Defendant International Union of Operating

Engineers, Local No. 370 (which will hereafter for sake of brevity be referred to as Operating Engineers Local No. 370), having appeared by representatives and witnesses and having been represented by R. Max Etter, its counsel of record, and the Defendants Joint Council of Teamsters No. 28 and Western Conference of Teamsters having appeared by Stephen V. Carey, of Bassett, Vance & Davies, their counsel of record, and the Court at the commencement of said trial and before the introduction of any evidence having sustained and granted the oral Motion of Plaintiff to strike from the Affirmative Defenses of the Defendants, Teamsters Local No. 839 and Operating Engineers Local No. 370, those portions thereof as set forth in their respective Answers to the Amended Complaint of Plaintiff reading as follows:

“Said area, although in part within the exterior boundaries of Benton County, has always been regarded by labor unions and by contractors as segregated from the remainder of Benton County for the purpose of negotiating labor agreements and was so regarded when the labor agreements described in the plaintiff’s original and amended complaints were being negotiated. For many years prior to and during the year 1955 all contractors, contracting with the United States Atomic Energy Commission for the performance of construction work in said area, have negotiated their labor agreements with labor unions, including the defendant Local 839 (Local No. 370), through their bargaining representative

known as Hanford Contractors Negotiating Committee; and all of such contractors, who at the same time were engaged in performing construction work in Benton County and adjoining counties but not within said area, negotiated their labor agreements with labor organizations, including Local 839 (Local No. 370), through another and different bargaining representative known as Associated General Contractors of America, Inc., Spokane Chapter.

“The agreement dated the 19th day of December, 1955, by and between Associated General [132] Contractors of America, Inc., Spokane Chapter, and Teamsters Unions Locals 690, 148, 556, 551 and 839 (attached to plaintiff’s original complaint as Exhibit ‘A’) does not apply and was not intended to apply to construction work to be performed by plaintiff for Atomic Energy Commission under the contract described in paragraph IV of the amended complaint.

“The agreement dated the 24th day of December, 1955, by and between Associated General Contractors of America, Inc., Spokane Chapter, and Local No. 370 Engineers Union (attached to plaintiff’s original complaint as Exhibit ‘B’) does not apply, and was not intended to apply, to construction work to be performed by plaintiff for Atomic Energy Commission under the contract described in Paragraph IV of the amended complaint.”

and thereafter said cause having proceeded to trial upon the issues as then presented by the pleadings, in the light of the requests and admissions of the respective parties pursuant to Rule 36, and upon the

trial amendment of Defendants, Teamsters Local No. 839 and Operating Engineers Local No. 370, as permitted by the Court, pleading additional Affirmative Defenses to the Amended Complaint of the Plaintiff and the Court, at the conclusion of the Plaintiff's case, having granted the oral challenge of the Defendants, Joint Council of Teamsters No. 28 and Western Conference of Teamsters, to the jurisdiction of the Court and Motion to dismiss said Defendants from this cause for lack of jurisdiction in the Court, and the Court having, at the close of the case on the 19th day of June, 1957, orally announced its Decision herein, and being fully advised in the premises now makes the following:

Findings of Fact

I.

That at all times hereinafter mentioned Morrison-Knudsen Company, Inc., was and it now is a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at Boise, Idaho, and qualified to do business as a foreign [133] corporation within the State of Washington. That the activities of the Plaintiff, as hereinafter mentioned, were carried on in Benton County within the Southern Division of the above-entitled District and Court, and that in the prosecution of the activities hereinafter mentioned Plaintiff was engaged in an industry affecting commerce, as defined by the Labor Management Rela-

tions Act of 1947 of the United States and the National Labor Relations Act of the United States.

II.

That the Defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 839, at all times herein mentioned, was and it now is a voluntary unincorporated association and Labor Union and that said Teamsters Local No. 839 during all of the times hereinafter mentioned acted as the representative and bargaining agent for its members employed in all Heavy, Highway and Engineering Construction work within the Eastern portion of the State of Washington, East of the 120th Meridian, including Benton County, and certain portions of the State of Idaho.

That the Defendant Joint Council of Teamsters No. 28, at the times hereinafter mentioned, was and is a voluntary unincorporated association composed of Teamsters Local No. 839 and other Local Unions of the same International within the State of Washington.

That the Defendant Western Conference of Teamsters, at the times hereinafter mentioned was and is a voluntary unincorporated association composed of Joint Council of Teamsters No. 28 and other similar joint councils located within the Western States of the United States.

That the Defendant International Union of Operating Engineers, Local No. 370, at the times herein-

after mentioned, was and is a voluntary unincorporated association and Labor Union and [134] said Operating Engineers Local No. 370, through its officers and business manager acted as representative and bargaining agent for its members employed in all Heavy, Highway and Engineering Construction work within the Eastern portion of the State of Washington, East of the 120th Meridian, including Benton County, and certain portions of the State of Idaho.

That each of Defendant Teamsters Local No. 839 and Operating Engineers Local No. 370, during the times hereinafter mentioned, either had and maintained its principal office, or had an office or agents engaged in representing it or acting for its employee members within the Eastern District of Washington.

III.

That this action was brought and prosecuted by Plaintiff pursuant to and in accordance with and the jurisdiction of the Court is based upon the provisions of the Labor Management Relations Act of 1947 and more particularly Section 301 thereof, otherwise known as 29 U.S.C.A. Section 185. That the members of Teamsters Local No. 839 and of Operating Engineers Local No. 370 which were employed by Plaintiff, as hereinafter mentioned, were "employees in an industry affecting commerce as defined" in the Labor Management Relations Act of 1947 of the United States and the National Labor Relations Act of the United States.

IV.

That on or about the 25th day of November, 1955, Plaintiff entered into a Contract with the United States Atomic Energy Commission for the construction of Pumping Plant Additions, Office Additions and Modifications at the Hanford Atomic Products Operation within Benton County, State of Washington, a full, true and correct copy of which was introduced in evidence herein as Plaintiff's Exhibit 1 and thereafter and on or about the 28th day of November, 1955, commenced the performance of said work and for the purpose of the performance of said Contract employed upon the [135] Project members of Teamsters Local 839 and of Operating Engineers Local No. 370.

V.

That in February of 1955, the Plaintiff became and has at all times since been a member in good standing of Associated General Contractors of America, Inc., Spokane Chapter, and as such member Plaintiff assigned and delegated to said Associated General Contractors of America, Inc., Spokane Chapter, its bargaining rights covering all employee members of Teamsters Local No. 839 and of Operating Engineers Local No. 370 as employed by Plaintiff engaged in Heavy, Highway and Engineering Construction work within the Territory as covered by the Labor Agreements negotiated by said Associated General Contractors of America, Inc., Spokane Chapter. Pursuant to such delegated authority and on behalf of Plaintiff, as one of its

members, and for the account and benefit of Plaintiff the Associated General Contractors of America, Inc., Spokane Chapter, as of December 19, 1955, negotiated and entered into a Labor Agreement with Teamsters Local 839, a copy of which is attached to the original Complaint of the Plaintiff herein as Exhibit "A," and a copy of which was introduced in evidence herein as Plaintiff's Exhibit 2, and under date of December 24, 1955, negotiated and entered into a Labor Agreement with Operating Engineers Local No. 370, a copy of which is attached to the original Complaint of the Plaintiff herein as Exhibit "B," and a copy of which was introduced in evidence herein as Plaintiff's Exhibit 3. That in the Labor Agreement, Plaintiff's Exhibit 2, with the Defendant Teamsters Local 839, it was provided in part as follows:

"Article II—Territory and Work Covered:

"Section 1. This Agreement shall cover all Heavy, Highway and Engineering construction work in the following counties or parts of counties East of the 120th Meridian: Grant, Ferry, Stevens, Pend Oreille, Chelan, Lincoln, Spokane, Adams, Whitman, Benton, Franklin, Walla Walla, Garfield, Asotin, Columbia, Okanogan, Douglas, Kittitas and [136] Yakima in the State of Washington; and Boundary, Bonner, Kootenai, Benewah, Shoshone, Latah, Nez Perce, Lewis, Clearwater, and the North one-half of Idaho County in the State of Idaho. It will be noted that Locals 690,

148, 556, 551 and 839 do not have jurisdiction in Kittitas or Yakima Counties even though those counties extend East of the 120th Meridian. Further, that Local 551's territory extends to a line drawn east and west through Riggins and parallel to the 46th Parallel."

"Article VII—No Strike—No Lockout:

"It is mutually agreed that there shall be no strikes, lockouts, or other slowdowns or cessation of work authorized by either party on account of any labor differences pending the full utilization of the grievance machinery set up in Article IX. Provided, that employees covered by this Agreement shall not be expected to pass through a legally established picket line which has been placed by another American Federation of Labor Union."

"Article VIII—Other Employers and Subcontractors:

* * *

"Section 3. There shall be no special job agreements."

That in the Labor Agreement with the Defendant Operating Engineers Local No. 370 it was provided in part as follows:

"Article II—Territory and Work Covered

"Section 1. This Agreement shall cover all Heavy, Highway and Engineering construction work in the following counties or parts of counties

east of the 120th Meridian: Adams, Asotin, Benton, Chelan, Columbia, Douglas, Ferry, Franklin, Garfield, Grant, Kittitas, Lincoln, Okanogan, Pend Oreille, Spokane, Stevens, Walla Walla, Whitman and Yakima, in the State of Washington; and Benewah, Bonner, Boundary, Clearwater, Kootenai, Latah, Lewis, Nez Perce, Shoshone, and the north one-half of Idaho County, in the State of Idaho.”

“Article VIII—No Strike—No Lockout

“It is mutually agreed that there shall be no strikes, lockouts, or other slowdowns or cessation of work authorized by either party on account of any labor differences pending the full utilization of the grievance machinery set up in Article X. Provided, that employees covered by this Agreement shall not be expected to pass through a legally established picket line which [137] has been placed by another American Federation of Labor Union.”

“Article IX—Other Employers and Subcontractors

* * *

“Section 3. There shall be no special job agreements.”

That each of said Labor Agreements heretofore mentioned, being Plaintiff’s Exhibits 2 and 3, became effective according to its terms and provisions on January 1, 1956, and remained in full force and effect throughout the years 1956 and 1957 to and including the dates covered by the trial of this action.

VI.

That during the year 1952, there was formed at Hanford Works and at the instigation of the United States Atomic Energy Commission a group known as Hanford Contractors Negotiating Committee, which in that year negotiated a Labor Agreement on behalf of "the signatory construction contractors, representing and acting for contractors who presently or during the life of this Agreement become signatory to this Agreement and perform construction, alteration or repair of public works at the Hanford Works, State of Washington" for the Atomic Energy Commission, a copy of which was introduced in evidence herein as Plaintiff's Exhibit 6, and which said Agreement became effective as of October, 1952, and remained in force and effect until terminated as hereinafter stated. That each of Defendants Teamsters Local 839 and Operating Engineers Local 370 became a signer of and a party to said Labor Agreement commonly known and referred to as the "Hanford Works Agreement," and although certain contractors having contracts with the Atomic Energy Commission during the years 1952 to 1955, both inclusive, became signers of said Agreement the Plaintiff never signed said Hanford Works Agreement or authorized the Hanford Contractors Negotiating Committee to negotiate for or [138] represent it. By written notification of December 29, 1955, (Defendants' Exhibit 16) and as admitted by the Defendants Teamsters Local No. 839 and Operating Engineers Local No. 370 (See Plaintiff's Requests for Admissions Under

Rule 36—(10) and (13) and Defendants' Answers thereto), the Hanford Works Agreement, Plaintiff's Exhibit 6, was terminated as of December 31, 1955.

VII.

That upon the termination of the Hanford Works Agreement (Defendants' Exhibit 16), the Defendants Teamsters Local No. 839 and Operating Engineers Local No. 370, jointly and severally demanded of Plaintiff, through its authorized bargaining agent and representative Associated General Contractors of America, Inc., Spokane Chapter, the continuance of furnishing by Plaintiff of free bus transportation from the North Richland Bus Terminal to the site of work within the Hanford Atomic Products Operation area for their members employed by Plaintiff, although the furnishing of such free bus transportation had never been a contractual requirement of any Labor Agreement covering the work at Hanford Works, and further demanded the payment to their members employed by Plaintiff of isolation pay, as provided for by the terminated Hanford Works Agreement, and refused to recognize the applicability of the Labor Agreements, Plaintiff's Exhibits 2 and 3, to the work of Plaintiff within the Hanford Works Area for the Atomic Energy Commission although said work was being carried on wholly within Benton County, Washington. Although Plaintiff, through its authorized bargaining agent and representative, Associated General Contractors of America, Inc., Spokane Chapter, offered to submit the applicability of

said Labor Agreements, Plaintiff's Exhibits 2 and 3, to the Hanford Works Area and the questions of the furnishing of free bus transportation and of isolation pay for hearing and arbitration in accordance with the grievance machinery, as set forth and established by Article IX of Plaintiff's [139] Exhibit 2 and Article X of Plaintiff's Exhibit 3, the Defendants Teamsters Local No. 839 and Operating Engineers Local No. 370 refused to submit such matters under the grievance machinery, as set forth in said Labor Agreements, disclaimed the applicability of Plaintiff's Exhibits 2 and 3 to the work of the Plaintiff within the Hanford Works Area and on March 22, 1956, upon the discontinuance by Plaintiff of the furnishing of free bus transportation and of isolation pay to the members of the Defendant Local Unions then in the employ of Plaintiff, said Defendant Teamsters Local No. 839 and Defendant Operating Engineers Local No. 370, acting in concert, caused their respective membership to strike the work of Plaintiff under its Contract, Plaintiff's Exhibit 1, with the Atomic Energy Commission and to cease all work thereon or for Plaintiff and on April 5, 1956, caused the work of Plaintiff to be picketed, which strike and refusal to work continued to and until the 6th day of June, 1956.

VIII.

That although the Defendants Teamsters Local No. 839 and Operating Engineers Local No. 370 pleaded by way of trial amendment and as an Affirmative Defense that:

“At the time of the commencement of work Plaintiff agreed with the Defendants Local 839 and 370 that said Hanford Contract should apply to said job until completed and although termination notice of said Contract was made on December 29th the terms of said Contract were applied until after March 20, 1956.”

the Court finds with respect to said Affirmative Defense that no part thereof was established by the evidence introduced in this cause and further specifically finds that there was no Agreement made as pleaded and that any statement or statements claimed by witnesses for the Defendants to have been made by Lee E. Knack, Manager of Labor Relations for Plaintiff, at a meeting held in Pasco, Washington, on January 5, 1956, were not made as a contractual commitment on behalf of Plaintiff to any party to this action, [140] or were said statement or statements, if any, in any manner relied upon by the Defendants or their membership.

From the above and foregoing Findings of Fact the Court deduces the following:

Conclusions of Law

I.

That an Order should be entered as a part of the Judgment herein granting the oral Motion, made at the beginning of the trial of this action by counsel for Plaintiff, to strike that portion of the Affirma-

tive Defenses, as pleaded by the Defendants Teamsters Local No. 839 and Operating Engineers Local No. 370, as set forth in the preamble to the Findings of Fact herein.

II.

That an Order should be entered as a part of the Judgment herein sustaining the oral challenge by counsel for Defendants Joint Council of Teamsters No. 28 and Western Conference of Teamsters to the jurisdiction of this Court under the allegations of the Complaint and the proof adduced upon the Plaintiff's case and granting the oral Motion of said counsel for said Defendants to dismiss this action as to said Defendants for lack of jurisdiction.

III.

That this Court has jurisdiction of the cause of action asserted by the Plaintiff herein under the provisions of the Labor Management Relations Act of 1947, and more particularly Section 301 thereof, otherwise designated as 29 U.S.C.A., Section 185, and has jurisdiction of the Plaintiff and of the Defendants Teamsters Local No. 839 and Operating Engineers Local No. 370.

IV.

That the Labor Agreement, Plaintiff's Exhibit 2, was entered into between the Plaintiff, through its agent and representative Associated General Contractors of America, Inc., Spokane Chapter, and the Defendant Teamsters Local No. 839 and [141] was applicable in all of its terms to the members of

said Defendant Union employed by Plaintiff in the performance of its Contract, Plaintiff's Exhibit 1, with the Atomic Energy Commission within Benton County, State of Washington, during the year 1956 and until the completion of Plaintiff's work under said Contract in approximately May of 1957, was a Contract between Plaintiff, as an employer engaged in an industry affecting commerce, and the Defendant Teamsters Local No. 839, as a Labor Organization representing employees in an industry affecting commerce within the purview of Section 301 of the Labor Management Relations Act of 1947 (29 U.S.C.A., Section 185), and was binding upon Defendant Teamsters Local No. 839 and its members.

V.

That the Labor Agreement, Plaintiff's Exhibit 3, was entered into between the Plaintiff, through its agent and representative Associated General Contractors of America, Inc., Spokane Chapter, and the Defendant Operating Engineers Local No. 370 and was applicable in all of its terms to the members of said Defendant Union employed by Plaintiff in the performance of its Contract Plaintiff's Exhibit 1, with the Atomic Energy Commission within Benton County, State of Washington, during the year 1956 and until the completion of Plaintiff's work under said Contract in approximately May of 1957; was a Contract between Plaintiff, as an employer engaged in an industry affecting commerce, and the Defendant Operating Engineers Local No. 370, as a Labor Organization representing employees in an

industry affecting commerce within the purview of Section 301 of the Labor Management Relations Act of 1947 (29 U.S.C.A., Section 185), and was binding upon Defendant Operating Engineers Local No. 370 and its members.

VI.

That by reason of the failure and refusal of the Defendant Teamsters Local No. 839 to abide by and act in accordance with [142] the grievance machinery, as provided for by Plaintiff's Exhibit 2, Article IX, and the failure and refusal of the Defendant Operating Engineers Local No. 370 to abide by and act in accordance with the grievance machinery, as provided for by Plaintiff's Exhibit 3, Article X, and the combined action of said Defendant Unions in causing, approving and acting in furtherance and support of the strike and work stoppage on March 22, 1956, by the members of each Defendant then employed by Plaintiff in the performance of its Contract, Plaintiff's Exhibit 1, with the Atomic Energy Commission, said Defendant Teamsters Local No. 839 was guilty of a breach of Article VII of Plaintiff's Exhibit 2 and Defendant Operating Engineers Local No. 370 was guilty of a breach of Article VIII of Plaintiff's Exhibit 3, and by reason thereof said Defendants became and are liable, jointly and severally, to Plaintiff for such damages as may hereafter be established to have resulted to Plaintiff therefrom upon a hearing to be hereafter fixed by this Court to ascertain the amount thereof.

VII.

That upon a trial having been had, at a date to be hereafter fixed by the Court, upon the issue of the amount of damages, if any, sustained by the Plaintiff as a result of the breaches of Contract as referred to in paragraph VI of these Conclusions of Law there shall be entered herein Supplemental Findings of Fact and Conclusions of Law with respect to such issue and based thereon and upon the Conclusions of Law hereinbefore set forth a Judgment shall then be entered herein in conformity therewith.

Done in Open Court this 24th day of July, 1957.

/s/ SAM M. DRIVER,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed July 24, 1957. [143]

[Title of District Court and Cause.]

SUPPLEMENTAL FINDINGS OF FACT AND
CONCLUSIONS OF LAW UPON THE
ISSUE OF DAMAGES

This Cause having come on regularly for hearing and trial on the 24th day of February, 1958, before the undersigned Judge of the above-entitled Court, sitting at Spokane within said District pursuant to stipulation of the parties hereto, through

their respective counsel of record, upon the issue of damages, if any, to be awarded to the Plaintiff and against the Defendants in accordance with the Findings of Fact and Conclusions of Law upon the issue of liability as heretofore entered herein on the 24th day of July, 1957, and the Plaintiff Morrison-Knudsen Company, Inc., a corporation, having appeared at said hearing by representatives and witnesses and having been represented by Gerald DeGarmo and Harold J. Hunsaker of Allen, DeGarmo & Leedy and Dorsey & Haight, its counsel of record, the Defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 839, (which will hereafter for sake of brevity be referred to merely as Teamsters Local No. 839) having appeared by representatives and witnesses and having [144] been represented by Samuel B. Bassett and Stephen V. Carey of Bassett, Davies & Roberts, its counsel of record, the Defendant International Union of Operating Engineers, Local No. 370, (which will hereafter for sake of brevity be referred to as Operating Engineers Local No. 370) having appeared by representatives and witnesses and having been represented by R. Max Etter, its counsel of record, and the Court having heard and considered the evidence and the argument of counsel at the conclusion thereof and having heretofore and on February 27, 1958, announced its oral decision herein upon the issue of damages and being fully advised in the premises now makes the following:

Supplemental Findings of Fact

I.

That by reason and as a direct and proximate result of the strike and refusal to work of the Defendants Teamsters Local No. 839 and Operating Engineers Local No. 370 in breach of their respective Contracts with Plaintiff, as set forth in the Findings of Fact entered herein on July 24, 1957, the Plaintiff suffered and sustained loss, costs and damages in the following amounts and with respect to the following items, to wit:

Item

1	Overhead Salaries During Strike Period	13,389.00
2	Office Rent, Furnishings and Engineering Equipment	1,168.38
3	Transportation to Protect Property During Strike	344.00
4	Director of Labor Relations Costs..	537.75
5	Telephone Expense	563.28
6	Legal Expense	750.00
7	Re-employment Costs After Strike..	896.01
8	Equipment Rentals	18,938.82
10	Interest on Invested Capital.....	1,624.22
12	General Administrative Expense...	17,331.30
13	Extra Strength Concrete.....	675.75
14	Wage Increase After January 1, 1957	2,284.49
15	Extended Time Maintaining General Electric Company Offices.....	478.59
16	Efficiency Loss for Labor and Extra Cost Materials	75,933.89

17	Status Quo Transportation and Iso- lation Pay	6,432.64
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Total Direct Costs and Expense..	\$141,348.12
	\$141,348.12

and that Plaintiff is further en-
titled to an allowance upon said di-
rect cost, expense and damage Items
1, 2, 8, 10, 12, 15 and 17, totaling
\$59,362.95 of a reasonable markup or
profit of 10% or..... 5,936.29

making a total of.....\$147,284.41

From the above and foregoing Supplemental
Finding of Fact the Court deduces the following:

Supplemental Conclusion of Law

I.

That the Plaintiff Morrison-Knudsen Company,
Inc., a corporation, is entitled to the entry of a
Judgment herein against the Defendants Teamsters
Local No. 839 and Operating Engineers Local No.
370, jointly and severally, for the sum of \$147,-
284.41, together with interest thereon at the rate of
6% per annum from the date of entry of Judge-
ment herein until paid, and together with Plain-
tiff's costs and disbursements herein to be taxed and
allowed in the manner provided by law.

Done in Open Court this 14th day of April, 1958.

/s/ SAM M. DRIVER,
District Judge.

[Title of District Court and Cause.]

ORDER UPON MOTION TO STRIKE AFFIRMATIVE DEFENSES, MOTION TO DISMISS AND JUDGMENT

This Cause having come regularly on for trial on the 10th day of June, 1957, upon the issue of liability, and on the 24th day of February, 1958, upon the issue of damages, before the undersigned Judge of the above-entitled Court, sitting at Spokane within said District pursuant to the written Stipulation of the parties hereto, through their respective counsel of record, that the cause be "transferred for trial from Yakima to Spokane" and that said cause be first "assigned for hearing to determine the question of liability only, and if liability is found in favor of the Plaintiff it shall be continued and assigned for hearing at a later date for determination of damages," which Stipulation of the parties was approved by the Court and Plaintiff Morrison-Knudsen Company, Inc., a corporation, having appeared at said separate hearings by representatives and witnesses and having been represented by Gerald DeGarmo and Harold J. Hunsaker of Allen, DeGarmo & Leedy and Dorsey & Haight, its counsel of records, [147] the Defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 839, having appeared at the hearing upon the issue of liability by Stephen V. Carey of Bassett, Vance & Davies and at the hearing upon

the issue of damages by Samuel B. Bassett and Stephen V. Carey of Bassett, Davies & Roberts, its counsel of record, the Defendant International Union of Operating Engineers, Local No. 370, having appeared at said hearings by representatives and witnesses and having been represented by R. Max Etter, its counsel of record, and the Defendants Joint Council of Teamsters No. 28 and Western Conference of Teamsters having appeared by Stephen V. Carey of Bassett, Vance & Davies, their counsel of record, and the Court during the hearing upon the issue of liability having heard and orally granted the Motion of the Plaintiff to strike from the Affirmative Defenses of the Defendants certain allegations as hereinafter more particularly set forth, and having heard and orally granted the Motion of counsel for Joint Council of Teamsters No. 28 and Western Conference of Teamsters to dismiss this action as to said Defendants for lack of jurisdiction, and the Court having heretofore and on the 24th day of July, 1957, made and entered its Findings of Fact and Conclusions of Law upon the issue of liability and having heretofore made and entered its Supplemental Findings of Fact and Conclusions of Law upon the issue of damages, and deeming itself fully advised in the premises:

Now, Therefore, It Is Hereby Ordered that the oral Motion of counsel for the Plaintiff Morrison-Knudsen Company, Inc., made at the beginning of the trial of this action upon the issue of liability

to strike from the Affirmative Defenses as pleaded by the Defendants in their respective Answers to the Amended Complaint of Plaintiff the portions thereof reading as follows:

“Said area, although in part within the exterior boundaries of Benton County, has always been regarded by labor unions and by contractors as segregated from the remainder [148] of Benton County for the purpose of negotiating labor agreements and was so regarded when the labor agreements described in the plaintiff’s original and amended complaints were being negotiated. For many years prior to and during the year 1955 all contractors, contracting with the United States Atomic Energy Commission for the performance of construction work in said area, have negotiated their labor agreements with labor unions, including the defendant Local 839 (Local No. 370), through their bargaining representative known as Hanford Contractors Negotiating Committee; and all of such contractors, who at the same time were engaged in performing construction work in Benton County and adjoining counties but not within said area, negotiated their labor agreements with labor organizations, including Local 839 (Local No. 370), through another and different bargaining representative known as Associated General Contractors of America, Inc., Spokane Chapter.

“The agreement dated the 19th day of December, 1955, by and between Associated General Contractors of America, Inc., Spokane Chapter, and Team-

sters Unions Locals 690, 148, 556, 551 and 839 (attached to plaintiff's original complaint as Exhibit 'A') does not apply and was not intended to apply to construction work to be performed by plaintiff for Atomic Energy Commission under the contract described in paragraph IV of the amended complaint."

"The agreement dated the 24th day of December, 1955, by and between Associated General Contractors of America, Inc., Spokane Chapter, and Local No. 370 Engineers Union (attached to plaintiff's original complaint as Exhibit 'B') does not apply, and was not intended to apply, to construction work to be performed by plaintiff for Atomic Energy Commission under the contract described in Paragraph IV of the amended complaint."

be and the same is hereby granted in accordance with the oral Order of the Court as made at the time of the hearing upon said Motion.

It Is Further Ordered that the oral Motion of counsel for the Defendants Joint Council of Teamsters No. 28 and Western Conference of Teamsters as made during the course of the hearing upon the issue of liability herein to dismiss this action as to said Defendants for lack of jurisdiction of this Court under the allegations of the Amended Complaint of the [149] Plaintiff and the proof adduced in support thereof be and the same is hereby granted in confirmation of the oral Order granting

said Motion as made at the conclusion of the hearing thereon.

It Is Further Ordered, Adjudged and Decreed that pursuant to the Order above this action be and the same is hereby dismissed as to the Defendants Joint Council of Teamsters No. 28 and Western Conference of Teamsters and that said Defendants have and recover their costs and disbursements herein to be taxed against the Plaintiff in the manner as provided by law.

It Is Further Ordered, Adjudged and Decreed that Morrison-Knudsen Company, Inc., a corporation, Plaintiff herein, is hereby granted Judgment against International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 839, and International Union of Operating Engineers, Local No. 370, Defendants herein, jointly and severally, in the amount of \$147,284.41, together with interest thereon at the rate of 6% per annum from the date of entry of this Judgment until paid, and together with the costs and disbursements of Plaintiff to be taxed against said Defendants in the manner as provided by law.

Done in Open Court this 14th day of April, 1958.

/s/ SAM M. DRIVER,
District Judge.

[Endorsed]: Filed April 14, 1958. [150]

[Title of District Court and Cause.]

DEFENDANTS' MOTION FOR
ADDITIONAL FINDINGS

The defendants International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, Local No. 839, and International Union of Operating Engineers, Local No. 370, move that the court make and enter their Proposed Additional Findings of Fact I to XXVIII, filed herewith.

BASSETT, DAVIES &
ROBERTS,

/s/ STEPHEN V. CAREY,

Attorneys for Defendants, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 839;

/s/ R. MAX ETTER,

Attorney for Defendant, International Union of Operating Engineers, Local No. 370. [151]

[Title of District Court and Cause.]

DEFENDANTS' PROPOSED ADDITIONAL
FINDINGS OF FACT

I.

The contract described in paragraph IV of the plaintiff's amended complaint between the plain-

tiff and United States Atomic Energy Commission, dated November 25, 1955, covered construction work to be performed by the plaintiff exclusively within the area now known as "Hanford Atomic Products Operation."

II.

On February 18, 1943, Henry L. Stimson, the then Secretary of War, addressed a letter to the then Attorney General of the United States stating that

"It is necessary and advantageous to the interest of the United States that certain lands situated in Benton County, State of Washington, be acquired for use in connection with the establishment of the Gable Project * * * The aforementioned lands are to be utilized for the establishment of a military reservation, and for other military uses incident thereto, and the utmost haste in expediting this project is vital to the successful prosecution of the war. It is requested that pursuant to the provisions of the Act of Congress approved March 27, 1942, (Public Law 507-77th Congress) you procure an order of the court granting immediate possession of the aforesaid lands." [152]

III.

In compliance with the request of the Secretary of War, the Attorney General of the United States, through the United States District Attorney for the Eastern District of Washington, on February 23, 1943, caused a petition for condemnation to be filed

in the above-entitled Court, entitled: "No. 128—United States of America, Petitioner, vs. Clements P. Alberts, Defendant," which petition described the lands sought to be acquired by the United States for the purposes described by the Secretary of War. Said lands were identified as Area "A" in Benton County, Washington, containing 176,323 acres, more or less, and Area "D" in Benton County, Washington, containing 17,510 acres, more or less.

IV.

Upon the filing of the described petition for condemnation the court, on February 23, 1943, entered its order granting the United States of America, the petitioner, the right of immediate possession of the described lands upon a proper showing that the said lands were being acquired in time of war for military, naval, or other war purposes and that immediate possession thereof was required in order that the same might forthwith be occupied, used and improved for the purposes described in the condemnation petition.

V.

On April 12, 1943, the Secretary of War addressed a letter to the Attorney General of the United States referring to the condemnation proceeding then pending and stating, in part:

"It has been administratively determined to be advantageous to the interest of the United States to

amend the petition in condemnation and order of possession in order to correctly and fully describe all of the lands to be affected by this proceeding, and to further amend said petition and order to provide for the acquisition of certain existing easements for railroads in the lands involved.

“It is requested, therefore, that you take the necessary action to amend the petition and order of possession [153] to include all of the lands described in the attached Exhibit ‘A’ as Areas ‘A,’ ‘D’ and ‘E’ * * *.”

In that letter the lands to be acquired were described as “Hanford Engineering Works.”

VI.

As requested by the Secretary of War, an amended petition for condemnation was filed on April 22, 1943, describing three areas to be acquired and designated as “A,” “D,” and “E,” Area “A” containing 182,723 acres, more or less, in Benton County, Washington; Area “D” containing 17,000 acres, more or less, in Benton County, Washington, and Area “E” containing 6,400 acres, more or less, in Benton, Yakima and Grant Counties, Washington, aggregating 206,123 acres, more or less.

VII.

Upon the filing of the said amended petition the court, on April 22, 1943, entered its order granting

the United States of America the right of immediate possession of the described lands upon a proper showing that the same were being acquired in time of war for military, naval, or other war purposes and that immediate possession was required in order that the same be devoted to the purposes described in the amended petition, namely, for "the establishment of the Hanford Engineering Project, for a military reservation and for other military uses incident thereto."

VIII.

Upon the entry of the said orders of February 23, 1943 and April 22, 1943, the United States, through the War Department, took possession of all of the described lands and thereafter acquired additional lands so that ultimately the area included in excess of 400,000 acres, the greater portion being within the exterior limits of Benton County.

IX.

Following the passage of the Atomic Energy Act of 1946 [154] the President, by Executive Order 9816, dated December 31, 1946, transferred all of the lands and property then known as "Manhattan Engineering District, War Department," to the Atomic Energy Commission which at all times since has possessed and operated the same for the production of fissionable material, as provided by the Atomic Energy Act of 1946, as amended.

X.

The area designated in the condemnation petitions as "Cable Project" and "Hanford Engineering Works," and designated as "Manhattan Engineering District, War Department" at the time of its transfer to the Atomic Energy Commission is the same area referred to in the plaintiff's amended complaint as "Hanford Atomic Products Operation," and hereafter in these findings will be referred to as the Hanford Area or Hanford Atomic Products Operation.

XI.

Immediately after the War Department took possession of the described lands it entered into a contract with Du Pont De Nemours & Company for the construction and operation of a plant, the performance of architect-engineer services and other work and services all as directed by the United States government, and pursuant to such contract and directions fissionable material was produced, which was used for war purposes, and after the transfer of the area to the Atomic Energy Commission it entered into a similar contract with the General Electric Company for the construction of additional plants, the operation of facilities, the performance of architect-engineer services, and for other work and services all as directed by the Atomic Energy Commission, and pursuant to such contract and directions fissionable materials were produced in accordance with the Atomic Energy

Act of 1946 and as amended by the Atomic Energy Act of 1954.

XII.

The contracts of the Du Pont and General Electric Company [155] covered not only the construction and operation of facilities for the manufacture of fissionable materials but also the performance of many related engineering, architectural and research services. Those contracts also included the construction, management and operation of extensive housing and business facilities required to meet the needs of the employees, together with all necessary municipal services. The Federal government acquired the lands by purchase or condemnation and has always used the same for the purposes and objects of constructing and operating a plant for the production of fissionable materials. While the Federal government did not elect to take exclusive jurisdiction of the area, it has controlled all ingress and egress to and from the area and only those with official business and appropriate identification and security clearance have been permitted in the area.

XIII.

From time to time from February 23, 1943, as the United States acquired lands in Benton County and adjoining counties for use as the "Hanford Atomic Project Operation" all lands and facilities, the ownership of which became vested in the Federal government, have been immune from taxation

by the State of Washington and its political subdivisions, including the County of Benton.

XIV.

After the Hanford Area had been acquired by the War Department for purposes of national defense and after its transfer to Atomic Energy Commission, by reason of special arrangements between state authorities, Federal authorities and contractors doing work within the area, compensation to injured workmen and their dependents was made under a plan similar to the terms and provisions of the Washington Workmen's Compensation Act, but that plan was administered by special administrative procedures applicable to that area only and not applicable to Benton County or to the State generally. This plan for compensating injured workmen and their dependents was made pursuant to Chapter 85 of Laws [156] of Washington, 1943, as amended by Chapter 144, Laws of Washington, 1951.

XV.

After the acquisition of the Hanford Area and during its operation, as stated in the preceding Findings I to XIV inclusive, the Criminal Code as enacted by the State of Washington became applicable thereto by reason of the Federal Assimilated Crimes Act of 1940 (54 Stat. 234) as re-enacted in 1948 and now appearing as Federal Revised Criminal Code, 18 U.S.C. Section 13.

XVI.

On September 1, 1950, a contract was entered into between the Spokane Chapter of the Associated General Contractors and Engineers Local 370 and Teamsters Local 839 (Defendants' Exhibit 4) covering work to be performed during the years 1950-1955 and it remained in effect until superseded as of January 1, 1955, by the two contracts described in Finding XX (Plaintiff's Exhibits 2 and 3). This contract applied to construction work performed in Benton County and adjoining counties outside the limits of the Hanford Area and was never applied to construction work within that area.

XVII.

On September 29, 1952, V. K. O'Connor, John Molitor, Edmund P. Erwen, F. M. Cochrane, F. S. Garrett and J. O. Murray organized as "Employer Negotiating Committee," and also known as "Hanford Contractors Negotiating Committee," entered into a contract with Pasco-Kennewick Building Trades Council providing in detail for wages, hours and working conditions applicable to construction work to be performed in the Hanford Area. This contract (Plaintiff's Exhibit 6) provided that it should remain in force until January 1, 1954, and from year to year thereafter until terminated on notice. In addition to prescribed hourly wage rates it provided for an allowance for "isolation pay" originally fixed at \$1.50 per day and increased from time to time until [157] in the latter part of 1955 it had become \$2.62½ per day. Although this con-

tract as originally executed did not provide for bus transportation to be supplied by contractors to their workmen employed in remote portions of the Hanford Area, the fact is that it was modified so that in actual operation bus transportation was furnished by the employing contractors. This contract as executed on September 29, 1952, between Employer Negotiating Committee and Pasco-Kennewick Building Trades Council was accepted by both Operating Engineers Local No. 370 and Teamsters Local No. 839. This contract applied exclusively within the Hanford Area, whereas the contract described in the preceding Finding XV contemporaneously in effect applied to work performed in those portions of Benton County and adjoining counties not included within the Hanford Area. Kenneth M. McCaffree was not a member of the Employer Negotiating Committee, and there is no evidence from which the court can find that he at any time had authority to alter or modify or terminate the contract as originally executed by that Committee.

XVIII

On November 25, 1955, a contract between the plaintiff Morrison-Knudsen Company, Inc., and Atomic Energy Commission was entered into for the construction of certain facilities in the Hanford Area for a lump sum of \$1,869,580.00. This contract (Plaintiff's Exhibit 1) required the contractor to commence work within five calendar days after receipt of written notice to proceed and the plaintiff

did commence work on November 28, 1955. This contract contained a provision entitled "32. Prevailing Wage Rates and Allowances," and reading, in part, as follows:

"During the life of the Hanford Works agreement the contractor agrees to pay laborers and mechanics engaged in the work hereunder at Hanford Works the scale of wages and allowances prevailing at Hanford Works, including all terms of any modification thereof, as determined by the Commission * * *."

From November 28, 1955, until on or about March 22, 1956, plaintiff [158] did pay isolation pay and did furnish bus transportation to laborers and mechanics according to the terms and conditions of the Hanford Area contract as originally negotiated and thereafter modified.

XIX

After the plaintiff commenced work under its contract with Atomic Energy Commission dated November 25, 1955 (Plaintiff's Exhibit 1), and before the execution of the two contracts (Plaintiff's Exhibits 2 and 3), described in the next succeeding finding, for the alleged breaches of which the plaintiff is claiming damages in this action, proposals were made to the defendant Unions by Kenneth M. McCaffree, purporting to act as Executive Secretary of the Hanford Contractors Negotiating Committee, for the elimination of isolation pay and discontinuance of bus transportation, but the de-

fendant Unions declined to acquiesce in such proposals and maintained that isolation pay should continue to be paid and bus transportation should continue to be furnished. The first of these proposals was made by a letter dated December 15, 1955, from Kenneth M. McCaffree (Defendants' Exhibit 12) and thereafter and prior to the 10th day of March, 1956, said McCaffree made other proposals of like import. There is no evidence from which the court can find that in making such proposals said McCaffree had any authority to alter or modify the contract of September 29, 1952, as originally executed by Employers Negotiating Committee and Pasco-Kennewick Building Trades Council and accepted by the defendant local unions.

XX.

On December 19, 1955, a contract between Associated General Contractors of America, Inc., Spokane Chapter, and five Teamster locals, including the defendant Pasco Teamster Local No. 839, was entered into (Plaintiff's Exhibit 2). On December 24, 1955, a similar contract was entered into between Associated General Contractors, [159] Inc., Spokane Chapter, and the defendant Engineers Local 370 (Plaintiff's Exhibit 3). These two contracts, being the contracts plaintiff now claims were breached, by their terms took effect on January 1, 1956, and superseded the prior contract dated September 1, 1950, described in preceding Finding No. XVI. The contract of December 19, 1955, between Associated

General Contractors and Teamsters Local 839 was not signed by the defendant Engineers Local 370. The contract of December 24, 1955, between Associated General Contractors and Engineers Local 370 was not signed by Teamsters Local 839. The plaintiff Morrison-Knudsen Company, Inc., did not sign either of these two contracts. The contract dated December 19, 1955, between Associated General Contractors and Teamsters Local 839 contained a provision reading:

“Article IX—Settlement of Disputes and Grievances

“Section 1. If a dispute involving the application or interpretation of the Agreement shall arise (other than jurisdictional disputes) written notice of the same shall be promptly (in no event later than ten (10) days) given by the offended party (either Contractor or the affected Union) to the other. If the two (2) parties are unable to adjust the same within forty-eight (48) hours, the dispute shall be settled by the following procedure * * *” (Plaintiff’s Exhibit 2, page 11).

The contract dated December 24, 1955, between Associated General Contractors of America, Inc., Spokane Chapter, and Operating Engineers Local No. 370 contained an identical provision relative to procedures for the settlement of disputes and grievances (Plaintiff’s Exhibit 3, page 9).

There is no evidence from which the court can find that when the dispute arose between the plain-

tiff and the defendant Unions the plaintiff, by written notice or otherwise, invoked the settlement procedures provided in both of said contracts.

XXI.

After the plaintiff had commenced work under its contract of November 25, 1955, with the Atomic Energy Commission (Plaintiff's [160] Exhibit 1) and after the execution of the labor contracts of December 19, 1955 and December 24, 1955 (Plaintiff's Exhibits 2 and 3), Kenneth M. McCaffree, purporting to act for and on behalf of Hanford Contractors Negotiating Committee, sent a letter dated December 29, 1955 (Defendants' Exhibit 16), to Teamsters Local 839 and Engineers Local 370, stating that Hanford Contractors Negotiating Committee was exercising the right to terminate the Hanford agreement as of December 31, 1955, but that letter further stated that the Hanford Contractors would not stop work as of January 1, 1956, but would maintain wages and conditions in effect after December 31, 1955, until a new agreement could be completed and until then the wage policy would remain unchanged. At the time this letter was transmitted to the two defendant Locals the plaintiff Morrison-Knudsen had been performing its contract with the Atomic Energy Commission in the Hanford Area since the preceding November 28, 1955, in conformity with its contract, which required it to maintain wages and working conditions according to the terms of the Hanford agreement dated September 29, 1952 (Plaintiff's Exhibit 6).

There is no evidence from which the court can ascertain by what authority said McCaffree assumed to act for Hanford Contractors Negotiating Committee (otherwise known as Employer Negotiating Committee) in giving notice of termination of the Hanford agreement of September 29, 1952, as of December 31, 1955, and there is no evidence that said McCaffree had any authority whatever to act for or on behalf of the plaintiff Morrison-Knudsen Company, Inc., in the alteration or modification of the wages, hours and working conditions under which the plaintiff was then executing its contract in the Hanford Area with the Atomic Energy Commission.

XXII.

Throughout the months of January, 1956 and February, 1956 and until on or about March 10, 1956, the Hanford Contractors Negotiating Committee continued to negotiate with union representatives, [161] including the two defendant Locals, Teamsters Local 839 and Engineers Local 370, for a new contract to supersede the Hanford Area contract of September 29, 1952, and continued such negotiations although the contracts between the Associated General Contractors and the Unions, dated December 19, 1955 and December 24, 1955 (Plaintiff's Exhibits 2 and 3) had been in force since the preceding January 1, 1956. During that period of negotiation no claim was ever made by the Associated General Contractors or by the plaintiff Morrison-Knudsen Company, Inc., that the contracts of December 19, 1955 and December 24,

1955, had any application to work which the plaintiff since November 28, 1955, had been performing and was then performing in the Hanford Area.

XXIII.

On March 8, 1956, Kenneth M. McCaffree, purporting to act as Executive Secretary of Hanford Contractors Negotiating Committee, addressed a letter to Eastern Washington Building Chapter and Spokane Chapter of Associated General Contractors stating that effective March 9, 1956, "bargaining rights" held by Hanford Contractors Negotiating Committee were assigned to Associated General Contractors, Spokane Chapter. There is no evidence from which the court can find by what authority, if any, said McCaffree in writing that letter acted for or with the approval of the Hanford Contractors Negotiating Committee (otherwise known as Employer Negotiating Committee) and there is no evidence from which the court can find that, even though said McCaffree had authority from that Committee the claimed assignment of "bargaining rights" operated retroactively to make the union labor contracts of December 19, 1955 and December 24, 1955 (Plaintiff's Exhibits 2 and 3), applicable to the work then being performed by the plaintiff for the Atomic Energy Commission under its contract of November 25, 1955.

XXIV

On the morning of March 22, 1956, the plaintiff's workmen [162] reported for work, as they had

customarily been doing since the plaintiff commenced the performance of its contract on the preceding November 28, 1955, but were unable to go to work because the plaintiff then failed and refused to have the customary bus transportation available. Because of the continued refusal of the plaintiff to pay isolation pay and furnish bus transportation the work stoppage of which the plaintiff complains in this action then began and continued seventy-six days until June 6, 1956, when the plaintiff resumed the payment of isolation pay and the furnishing of bus transportation.

XXV.

There is no evidence from which the court can find that at any time prior to March 22, 1956, the plaintiff ever accepted or agreed to be bound by either of the described labor contracts dated December 19, 1955 and December 24, 1955 (Plaintiff's Exhibits 2 and 3).

XXVI

On April 27, 1956, the law firm of Allen, DeGarmo & Leedy by Gerald DeGarmo, as attorneys for the plaintiff, addressed a letter to Teamsters Local 839 and Operating Engineers Local 370, referring to the work stoppage which had then been in effect for thirty-six days, since the preceding March 22, 1956 (Exhibit C referred to in the plaintiff's original and amended complaints and a photostatic copy in evidence as defendants' Exhibit 50). That letter, after referring to the two labor contracts, which the plaintiff now claims were breached

by the defendant Local Unions, states, in part, as follows:

“Morrison-Knudsen Company, Inc., as a member of the Associated General Contractors of America, Inc., Spokane Chapter, has at all times since January 1, 1956, recognized said Agreements heretofore mentioned as being in force and effect with your organizations and your members, applicable to the work being performed by it at the Hanford Atomic Products Operation * * *.”

Since a date prior to January 1, 1956, when the plaintiff [163] commenced the performance of its contract of November 25, 1955, with the Atomic Energy Commission, Lee Knack was Director of Labor Relations for the plaintiff and as such it was his function to supervise the execution of labor contracts between his company and various labor unions whose members were employed by the plaintiff. Russ Madsen was plaintiff's assistant district manager at its Seattle office, which office had supervision over the performance of the work being performed by plaintiff for Atomic Energy Commission. Both Lee Knack and Russ Madsen collaborated with plaintiff's attorney Gerald DeGarmo in writing the quoted letter, and it was also approved by Carroll F. Zapp, an officer of the plaintiff at its home office at Boise, Idaho. Although the work stoppage had been in progress since the preceding March 22, 1956, that letter of April 27, 1956, was the first time the plaintiff, or anyone acting for it, ever made any claim that the labor contracts of

December 19, 1955, and December 24, 1955 (Plaintiff's Exhibits 2 and 3), had any application to the work the plaintiff since November 28, 1955, had been performing in the Hanford Area.

XXVII.

The court finds that at all times since the Federal government first acquired the lands now constituting the Hanford Area (otherwise known as Hanford Atomic Products Operation) it has been and now is a Federal enclave acquired and always used for purposes of national defense and for the production of fissionable material, as provided by the Atomic Energy Act of 1946 as amended, and incidental activities. The labor contracts of December 19, 1955 and December 24, 1955 (Exhibits 2 and 3), by their terms are not applicable and were not intended by the parties thereto to be applicable to construction work to be performed within the limits of that area.

XXVIII.

The court further finds that if it be held that the said [164] contracts of December 19, 1955 and December 24, 1955, were applicable to the Hanford Area as now claimed by plaintiff the damages sustained by the plaintiff by reason of the work stoppage from March 22, 1956, to June 6, 1956, did not exceed the sum of \$.

Conclusions of Law

I.

The court concludes, as a matter of law, that the plaintiff has failed to establish any cause of action against the defendant Operating Engineers Local 370 or against the defendant Teamsters Local 839, and that this action should be dismissed as to each of said defendants with costs taxed against the plaintiff.

Done in Open Court this .. day of, 1958.

.....,

U. S. District Judge.

Considered and rejected April 17, 1958.

/s/ SAM M. DRIVER,

U. S. District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed April 15, 1958. [165]

[Title of District Court and Cause.]

ORDER DENYING MOTION TO MAKE AND
ENTER DEFENDANTS' PROPOSED
FINDINGS OF FACT

The above-named defendants, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Local No. 839, and International Union of Operating Engineers, Local

No. 370, have filed with the Clerk of this Court their Proposed Additional Findings of Fact, and there-with a motion that the court make and enter the same. The above-entitled cause is for damages for breach of contract, and the court separately tried the issues of liability and damages. Pursuant to trial on the first issue, the court decided that said defendants were liable to plaintiff for breach of contract and, on July 24, 1957, entered findings of fact and conclusions of law on that basis. Subsequently the court tried the issue of damages, determined the amount thereof, and on the 14th day of April, 1958, entered supplemental findings of fact and conclusions of law on the issue of damages. On the 15th day of April, said defendants filed their proposed additional findings of fact hereinabove mentioned. They do not in any way pertain to the issue of damages, but relate solely to the issue of liability. They are intended to and would provide the factual basis for the legal conclusion that the plaintiff is not entitled to recover against the said defendants, and would [166] necessitate the entry of a judgment dismissing the action.

It Is Now, Therefore, Ordered that the said defendants' motion that the court make and enter their additional proposed findings of fact, is hereby denied.

Dated this 21st day of April, 1958.

/s/ SAM M. DRIVER,

United States District Judge.

[Endorsed]: Filed April 21, 1958. [167]

[Title of District Court and Cause.]

DEFENDANTS' MOTION FOR ADDITIONAL
FINDINGS AND MOTION FOR AMEND-
MENT OF JUDGMENT

I.

The defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 839, and International Union of Operating Engineers, Local 370, severally move that the court make and enter their proposed Additional Findings of Fact I to XXVIII, inclusive, served on the plaintiff on March 26, 1958, and filed by the Clerk on April 15, 1958.

II.

The said defendants severally move that the judgment entered herein on April 14, 1958, be altered and amended by striking therefrom the provision that the plaintiff have judgment against the defendants "jointly and severally, for the sum of \$147,-284.71" for the reason that the evidence fails to establish any joint liability of the defendants to the plaintiff in the amount stated or in any amount whatsoever.

BASSETT, DAVIES &
ROBERTS,

/s/ STEPHEN V. CAREY,
Attorneys for Teamsters
Local 839;

/s/ R. MAX ETTER,

Attorney for Operating
Engineers Local 370.

Receipt of copy acknowledged.

[Endorsed]: Filed April 22, 1958. [168]

[Title of District Court and Cause.]

ORDER UPON MOTIONS FOR ADDITIONAL
OR SUPPLEMENTAL FINDINGS AND
CONCLUSIONS, AND AMENDMENT OF
JUDGMENT AND SUPPLEMENTAL
FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND JUDGMENT

This Cause having come regularly on for hearing on the 8th day of May, 1958, before the undersigned Judge of the above-entitled Court upon the Plaintiff's Motion for Amendment of Supplemental Findings of Fact and Conclusions of Law Upon Issue of Damages and Judgment and the Defendants' Motion for Additional Findings and Motion for Amendment of Judgment and the Plaintiff and Defendants having appeared by counsel of record and submitted argument in support of the respective Motions, and the Court having heard the same and having considered the matter, and deeming itself fully advised in the premises:

Now, Therefore, It Is Hereby Ordered that all Motions of the Plaintiff and Defendants herein directed against the Findings of Fact and Conclusions of Law Upon Issue of Liability, as entered

herein July 24, 1957, and against the Supplemental Findings of Fact and Conclusions of Law Upon the Issue of Damages and Judgment, as entered herein April 14, 1958, be and the same are hereby denied, except

It Is Hereby Ordered, Adjudged and Decreed that the portion of paragraph VI of the conclusions of Law upon issue of liability entered herein July 24, 1957, reading: [172]

“and by reason thereof said defendants became and are liable jointly and severally to plaintiff for such damages as may hereinafter be established to have resulted to plaintiff therefrom upon a hearing to be hereinafter fixed by this Court to ascertain the amount thereof.”

be, and the same is hereby amended to read as follows:

“and by reason thereof each of said defendants became and are liable to plaintiff for such damages as may hereinafter be established to have resulted to plaintiff therefrom upon a hearing to be hereinafter fixed by this Court to ascertain the amount thereof.”

It Is Further Ordered, Adjudged and Decreed that the Supplemental Conclusions of Law as entered herein April 14, 1958, be, and the same are hereby amended to read as follows:

“I.

“That the plaintiff, Morrison-Knudsen Company, Inc., a corporation, is entitled to the entry of a

judgment herein against each of defendants, Teamsters Local No. 839, and Operating Engineers Local No. 370, for the sum of \$147,284.41, together with interest thereon at the rate of 6% per annum from the date of entry of judgment herein until paid, together with plaintiff's costs and disbursements herein to be taxed and allowed in the manner provided by law. Said judgment shall provide that the satisfaction of said judgment against either of said defendants shall work and operate as an automatic pro tanto satisfaction of the judgment against the other defendant, to the end that plaintiff shall in no event collect or receive from said defendants, either individually or jointly, more than the total amount of the judgment, interest, and costs as found against each defendant."

It Is Further Ordered, Adjudged and Decreed that the last paragraph of the Judgment entered herein April 14, 1958, be, and the same is hereby amended and changed to read as follows:

"It Is Further Ordered, Adjudged and Decreed, that Morrison-Knudsen Company, Inc., a corporation, plaintiff herein, is hereby granted judgment against each of said defendants, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 839, and International Union of Operating Engineers, Local No. 370, in the sum of \$147,284.41, together with interest thereon at the rate of 6% per annum from the date of entry of this judgment until paid, together with the costs and disbursements of plaintiff

to be taxed against each of said defendants in the manner as provided by law. It Is Further Ordered that the satisfaction of said judgment against either defendant shall automatically operate as a pro tanto satisfaction of the judgment against the other defendant, to the end that plaintiff shall in no event collect from said defendants, [173] either individually or jointly, more than the total amount of the judgment, interest, and costs as aforesaid.

Done in Open Court this 8th day of May, 1958.

/s/ SAM M. DRIVER,

United States District Judge.

[Endorsed]: Filed May 8, 1958. [174]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 839, and International Union of Operating Engineers, Local No. 370, defendants above named, hereby jointly appeal, and each of them separately and severally appeals, to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 14, 1958, as amended by the order of the said District Court entered on May 8, 1958, awarding the plaintiff, Morrison-Knudsen Company, Inc., a corporation, damages against them

in the amount of \$147,284.41, together with interest and taxable costs.

The said defendants likewise appeal from that certain order entered April 21, 1958, denying said defendants' motion for the entry of their proposed Findings of Fact, and from that certain order entered on the 8th day of May, 1958, denying the motion of said defendants to amend the judgment as entered on April 14, 1958. [175]

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMER-
ICA, LOCAL No. 839,

BASSETT, DAVIES &
ROBERTS,

By /s/ STEPHEN V. CAREY,
Its Attorneys.

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL No. 370,

By /s/ R. MAX ETTER,
Its Attorney,

By /s/ ARTHUR A. ROSSMAN,
Its Business Manager.

[Endorsed]: Filed May 12, 1958. [176]

[Title of District Court and Cause.]

APPEAL BOND

Know All Men by These Presents:

That we, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 839, and International Union of Operating Engineers, Local No. 370, as principals, and Fidelity & Deposit Company of Maryland, a corporation, duly authorized to do business in the State of Washington, as surety, are held and firmly bound unto Morrison-Knudsen Company, Inc., a corporation, the plaintiff above-named, in the full sum of Two Hundred Fifty Dollars (\$250.00), for the payment of which sum well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Dated this 9th day of May, 1958.

The condition of this obligation is such, that whereas, the above-named International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 839, and International Union of Operating Engineers, Local No. 370, have appealed to the United States Court of Appeals for the Ninth Circuit from the judgment of the United States District Court for the Eastern District of [177] Washington, Southern Division, entered against them in the above-entitled action on

April 14, 1958, for the sum of \$147,284.41, together with interest and costs, which judgment of April 14, 1958, was amended by an order of said District Court entered May 8, 1958;

Now, Therefore, if said principals and appellants shall pay all costs if their said appeal is dismissed or the said judgment is affirmed or such costs as the Appellate Court may award if the judgment is modified, then this obligation shall be void, otherwise to remain in full force and effect.

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMER-
ICA, LOCAL No. 839,

BASSETT, DAVIES &
ROBERTS,

/s/ STEPHEN V. CAREY,
Its Attorneys;

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL No. 370,

By /s/ R. MAX ETTER,
Its Attorney;

By /s/ ARTHUR A. ROSSMAN,
Its Business Manager.

[Seal] FIDELITY & DEPOSIT COMPANY OF
MARYLAND, a Corporation,

By /s/ RICHARD K. DAVEY,
Its Attorney-in-Fact.

[Endorsed]: Filed May 12, 1958. [178]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
AND DOCKET RECORD ON APPEAL

Upon request of the Clerk of this Court and for
good cause shown, It Is Hereby

Ordered that the time in which to file and docket
the record on appeal in the above-entitled cause in
the United States Court of Appeals for the Ninth
Circuit, be extended to and including the 25th day
of July, 1958.

Dated this 3rd day of June, 1958.

/s/ SAMUEL M. DRIVER,
United States District Judge.

[Endorsed]: Filed June 3, 1958. [182]

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 1105

MORRISON-KNUDSEN COMPANY, INC., a
Corporation,

Plaintiff,

vs.

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS OF AMER-
ICA, LOCAL No. 839, et al.,

Defendants.

Sam M. Driver, United States District Judge.

TRANSCRIPT OF PROCEEDINGS

June 10, 1957

Appearances:

GERALD DeGARMO, ESQUIRE,
ALLEN, DeGARMO & LEEDY,
HAROLD J. HUNSAKER, ESQUIRE,
ALLEN, DeGARMO & LEEDY,

Appeared on Behalf of the Plaintiff.

R. MAX ETTER, ESQUIRE,

Appeared on Behalf of the Defendant In-
ternational Union of Operating En-
gineers, Local No. 370.

STEPHEN V. CAREY, ESQUIRE, of
BASSETT, GEISNESS & VANCE,

Appeared on Behalf of the Defendants,
Teamsters Local No. 839, Joint Council
of Teamsters No. 28, and Western Con-
ference of Teamsters.

(Whereupon, the following proceedings were had and done and testimony taken, to wit):

The Court: Morrison-Knudsen Company, Inc., vs. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 839, et al. Are you ready on that matter, gentlemen?

Mr. DeGarmo: Yes; we are.

Mr. Etter: Yes; we are. [184]

* * *

The Court: Mr. Carey, the motion you propose to make, would that require evidence to support it?

Mr. Carey: No; no. Just requires an elementary knowledge on the part of your Honor of the Taft-Hartley Law.

The Court: If it doesn't require evidence, of course, if you are going to bring in testimony here, or evidence of any kind that you are not prepared to meet, that wouldn't be fair. But if it is simply on a motion that requires no evidence, if you are not prepared to meet it now, I can give you an opportunity to submit briefs or get further time on it, whatever you wish, before I finally determine it.

Would that be acceptable?

Mr. DeGarmo: Yes. I am not objecting if [195*] they have some question, I would like to get that determined.

The Court: If it is really a question of jurisdiction it can be raised at any stage.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

Mr. DeGarmo: That is right; I am not objecting to their raising it.

Mr. Carey: Even in the Court of Appeals if it hadn't been raised below.

The Court: That is right.

Mr. DeGarmo: I haven't heard it before. I will be glad to hear it now.

Mr. Carey: I am very glad to accommodate you.

Frankly, maybe I am in some degree subject to censure for not having raised it before. If I am, it is just because of my lack of diligence. There are so many questions involved here that I just didn't do it before.

Here is the formal motion which in effect is a challenge to the jurisdiction so far as, not the Local 839, but the Joint Council 28 and Western Conference only.

Joint Council No. 28 of Teamsters and Western Conference of Teamsters each separately moves to dismiss this action as to it for the following jurisdictional reasons: [196]

1. Plaintiff invokes the jurisdiction of this United States Court relying exclusively on Section 301 of the Labor Management Act of 1947, commonly known as the Taft-Harley Law. The action is one to recover damages for the alleged breach of a contract dated December 19, 1955, a copy of which is attached to the plaintiff's amended complaint as Exhibit A.

Neither the Joint Council No. 28 nor the Western Conference is a party to that contract. Therefore, neither is within the grant of jurisdiction defined

in Section 301 of the Labor Management Act of 1947.

2. If it be assumed that the plaintiff's amended complaint states any cause of action against either Joint Council No. 28 or the Western Conference, which is not conceded, nevertheless, the cause of action so stated is not one for violation or breach of contract, but rather is one for inducing a breach of contract by the Teamsters Local 839 which is an action for tort not within the jurisdiction conferred on the United States District Court by Section 301 of the Labor Management Act of 1947. [197]

* * *

The Court: All right; thank you.

On this issue of liability I assume that the plaintiff would have the burden here, proceeding with the evidence. [203]

Mr. DeGarmo: May I address the Court?

The Court: Yes.

Mr. DeGarmo: At this time, if your Honor please, on behalf of the plaintiff I wish to renew orally a motion to strike. It is really not a renewal because the original motion to strike was directed against certain allegations of the affirmative defense of the original answer of the Teamsters and Operating Engineers to the original complaint of the plaintiff.

I now wish to address a motion to strike to the affirmative defenses as set forth in the amended answers or the answers of the Teamsters and Operating Engineers to the amended complaint of the

plaintiff. And the reason I address myself to this motion at this time is that I think it is well to present it to the Court now inasmuch as the motion has to do entirely with the question of the application of the parol evidence rule to the issue in this case, and it would be equally applicable, and I would have to make the same argument in any testimony as attempted to be offered in support of the affirmative defenses, so we might just as well dispose of it on a motion to strike the affirmative defenses, and then if that is granted, then it will not be [204] necessary to make the same argument with respect to the evidence.

I have filed with your Honor, and have served upon counsel, a motion, or rather a brief in support of this motion, and I have set forth in that brief—I think it will save your Honor looking at the pleadings if you will refer to the brief I presented on the parol evidence rule, because I have set forth in length in that brief the particular allegations of the affirmative defenses, and they are identical with respect to the two defendants to which this motion is directed, and the part which I am moving against and asking to have stricken is the portion which is quoted on page 1 of this brief.

Reading in this matter—your Honor will remember, and I wish to just go back a minute to refresh all of our recollections as to the basis of this litigation, that as Mr. Carey has pointed out to your Honor in support of his motion, the suit is based upon contract, upon two contracts, one between the Associated General Contractors made on behalf of

Morrison-Knudsen with the Teamsters, the other is on behalf of the Associated General Contractors made on behalf of the plaintiff with the Operating Engineers. And the suit, as I say, is upon that contract. [205]

Now in an endeavor to avoid the effect of the contract itself upon them, these defendants have pleaded thusly——

The Court: Pardon me, Mr. DeGarmo, before you proceed. I think I should inquire as to whether counsel for defendants feel that this section of their affirmative defense adequately states your position. In other words, are you intending to rely on this language in your permanent defense, or do you think you have evidence that will not——

Mr. Carey: I can't speak for Mr. Etter but speaking only for myself we are relying upon the affirmative defense as pleaded in our answer to the amended complaint. There is some variation.

Mr. DeGarmo: That is the one.

The Court: The one set out here?

Mr. DeGarmo: Yes, that is correct. You can check it with your answer as I read it to the Court now.

The Court: The thought I had in mind, I don't want to spend considerable time here and have them come in and say, "We'd like to amend it because we have evidence here that will go beyond." If you intend to rely on this it can be determined on this motion. [206]

Mr. Carey: As far as I know, I have no reason to think that we are not going to rely on that as stated.

The Court: Is that true of you, too, Mr. Etter?

Mr. Etter: Yes; there is an amended answer for the Engineers. If Mr. DeGarmo is reciting from that affirmative defense we are relying on that, yes.

The Court: I recall this language. It came up in motions down in Yakima, I think. It wasn't finally decided.

Mr. DeGarmo: Not this language. It was somewhat similar language in a previous answer. They have now changed the allegations and accordingly, your Honor will recall that on the previous motion to strike you denied it and said you did so with the idea that you'd like to hear the evidence at the time of trial, at least it was to be reserved until that time.

Since that time we filed an amended complaint and by their election they elected to file new answers and I am now quoting from the affirmative defense as set forth in the answer to the amended complaint, and as I understand it, this is the affirmative defense that they now intend to rely upon and attempt to [207] introduce evidence in support of.

The Court: All right.

Mr. DeGarmo: I might state to your Honor there is another portion of the affirmative defense that is not quoted here and which I will refer to subsequently. This motion is directed against this particular language. And keep in mind that there are two contracts here (reading):

"Said area, although in part within the exterior boundaries of Benton County, has always been regarded by labor unions and by contractors as segre-

gated from the remainder of Benton County for the purpose of negotiating labor agreements, and was so regarded when the labor agreements described in the plaintiff's original and amended complaints were being negotiated. For many years prior to and during the year 1955 all contractors contracting with the United States Atomic Energy Commission for the performance of construction work in said area, have negotiated their labor agreements with labor unions [208] including the defendant Local 839"—

And I am quoting in this part from the Teamsters' answer. The Operating Engineers' is identical except it refers to Local 370. (Continuing reading.) "——through their bargaining representative known as Hanford Negotiating Committee, and all such contractors who at the same time were engaged in performing construction work in Benton County and adjoining counties but not within said area, negotiated their labor agreement with a labor organization including Local 839 through another and different bargaining representative known as Associated General Contractors of America, Inc., Spokane Chapter. Agreement dated the 19th day of December, 1955, by and between Associated General Contractors of America, Inc., Spokane Chapter, and Teamsters Unions Locals 690, 148, 556, 551 and 839, attached to plaintiff's original complaint as Exhibit A, does not apply and was not intended to apply to construction work to be performed by plaintiff for the Atomic Energy [209] Commission under

the contract described in paragraph IV of the plaintiff's complaint."

The Court: The amended complaint?

Mr. DeGarmo: Of the amended complaint, [210] yes.

* * *

The Court: I think I have it in my file. I think I will recess now and read cases during the lunch hour. You will then have an opportunity to reply immediately after lunch.

Court will be in recess until 1:30. [237]

* * *

The Court: I might say that the letter I sent out to counsel, I think I reserved ruling on the merits of the issues preceded by the motion to strike. Federal Courts are not inclined to look with favor upon deciding issues by pleadings by motion to strike particularly in the early stages of litigation, and I don't feel at all bound by that.

Here we have quite a different situation where the separation of liability is before the Court for determination and counsel have indicated that the statement in there from the defendant fully covers their position and that the evidence which they would be in a position to introduce would not be broader or substantially different from the allegations, from the affirmative defense, the amended complaint. I [248] think I recall the case brought by the National Labor Relations Board that was tried at Yakima and I think the details of the situation were somewhat different there.

The question wasn't squarely presented. I think, of course, where there is a contract before the Court, particularly one which involves engineering or technical subjects and technical language, that it is advantageous for the Court perhaps to, in understanding background, understanding the subjects to which it is to apply, to understand the terms perhaps in some instances, that the Court may hear evidence of the negotiations leading up to the contract, the making of the contract in order to put the Court, as the Supreme Court of the State of Washington said, in the same position of the parties, same position of understanding and same position of knowledge of what the contract involves, what it pertains to and perhaps some of the terms employed, but I think in those cases, as I remember them, the Court is careful to point out that this is not taking the prior negotiations to vary the terms of the contract or to change its plain, unambiguous term so as to make a different contract from the one that parties have entered into.

Also so far as that goes, I quite agree with [249] the late Mr. Justice Jackson, that when he was confronted with a decision he had made that was inconsistent with his present views he said, "I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday."

So I think that it is better to be right than to be consistent when it comes right down to that. But it seems to me that here this contract is not ambiguous in respect to the coverage of the contract as including Benton County. I can't see any ambiguity in it.

I'd have to go outside and get evidence in order to find that there was any ambiguity and it seems to me that bringing in evidence here as to what the parties or at least one party contended, it would be violating the parol evidence rule.

There isn't here any contention, as I get it there was a mutual mistake, that the plaintiff also was mistaken and thought he wasn't dealing with Benton County. That, I assume, could not be established, I mean that the plaintiff was mistaken and thought he was not dealing with the Hanford Works or the contract was not to cover the Hanford Works.

It seems to me that here would be bringing evidence to show that while the contract was made to cover Benton County by plain terms, by implication [250] by exclusion of other areas that were not to be included in other counties, and by the maps attached, all indicate that the parties were dealing with Benton County as a geographical unit, as a county, and certainly nobody would have any doubt as to what Benton County, Spokane County or any other county means so far as its covering a particular area is concerned.

I also have in mind that in matters of this importance the parties here, Morrison-Knudsen, these Local and International Unions, Joint Council of Teamsters, are not like a grocer or a couple of grocers getting together and making a contract without the benefit of counsel or with perhaps counsel who is employed on the spur of the moment. These people are well represented. They have adequate legal staffs and legal representation.

They certainly knew, as everyone knows, what the situation was with reference to the Hanford area and if they did not intend to, if they intended it should be excluded from this contract it seems to me that the lawyers on one side or the other would have spelled it out in plain English and said so.

It would have been so easy to do. So that I think that the motion to strike should be granted. I have in mind perhaps that the defendants here who [251] wish to make their record, and may I suggest that perhaps the shortest, easiest way to do that would be for you to make an offer of proof at the proper time setting forth what your witnesses would testify or what your evidence would show with reference to your contention that the contract was not intended to and should not have covered, was not intended to and should not cover the Benton area, and, of course, I will permit you to make that offer even though the motion to strike affirmative defense has been granted.

Mr. Etter: Of course our position too is that the plaintiff never intended to cover—as your Honor knows, I gather that from one statement made. We don't say we were mistaken, we say they didn't intend to cover it in their end of it.

The Court: It would still be the unexpressed intention of the parties contrary to the contention as I see plainly expressed in the instrument. I gather that you are not claiming the legal defense of mutual mistake?

Mr. Etter: No, we don't say mutual mistake.

Mr. Carey: If your Honor please, I don't know whether I am speaking for you, Mr. Etter, or for ourselves.

The Court: If you are not speaking for [252] him, he will let you know, or me know, I [253] presume.

* * *

The Court: All right. I'd suggest you proceed with your proof, Mr. DeGarmo.

Mr. Carey, at the conclusion of his evidence any objections you have should be made on the sufficiency of his evidence.

I assume, Mr. DeGarmo, the issue of [257] liability if that is what we are trying, should include not only your contract, proof of your contracts and rights under the contract, but also the question of breach, would it not?

Mr. DeGarmo: Well, we are prepared to prove the breach although I didn't——

The Court: How could you establish liability without proving it?

Mr. DeGarmo: We are prepared to prove a breach.

The Court: I thought I wasn't just here to decide whether there is a contract or not.

Mr. DeGarmo: I think we are in a position to prove, although I don't think there is a great deal of issue between us.

The Court: All right.

Mr. DeGarmo: Maybe they will claim they didn't strike, but we will find out.

LEE KNACK

being first duly sworn on oath was called as a witness on behalf of the Plaintiff and testified as follows, to wit:

Direct Examination

By Mr. DeGarmo:

Q. Will you state your name, please? [258]

A. Lee Knack.

Q. And where do you reside, Mr. Knack?

A. In Boise, Idaho.

Q. And will you state your age for the record?

A. Forty-three.

Q. And by whom are you employed?

A. Morrison-Knudsen Co., Inc.

Q. And in what capacity are you employed, Mr. Knack?

A. Labor Relations Director.

Q. Will you state for the record just generally over what area the Morrison-Knudsen Co. operates?

A. As the Morrison-Knudsen Co. we operate in the United States and Alaska. We also operate in Canada. We also have subsidiary companies in foreign countries.

Q. And does your work as Labor Relations Director relate only to the activities within the United States, or to other areas?

A. My activities relate to United States, Canada, and Alaska.

Q. And for what period of time have you been employed in the capacity that you have mentioned?

A. In my present capacity as Labor Relations

(Testimony of Lee Knack.)

Director in excess of three years, about three and one-half years now. [259]

Q. Will you state, Mr. Knack, very briefly what is your background in this particular field of work?

A. Well, I began to have an association with the field of labor relations in about 1937 working for a chemical company. I worked for approximately six years with General Motors in their Industrial Relations Division of which Labor Relations is a subsection.

I also operated my own public and Labor Relations Agency in Colorado for a period of about six years prior to coming with the Morrison-Knudsen Co.

Q. Are you familiar, Mr. Knack, with an area which is commonly referred to, at least it has been in these proceedings, as Hanford Works?

A. Yes; I am.

Q. On or about November 25th of 1955, will you state whether Morrison-Knudsen Co. entered into a contract to perform certain work for the Atomic Energy Commission in that area?

A. Yes; we did.

Q. Do you have available with you here in court the original of that contract?

A. Yes, I have, in my briefcase. May I get that?

Q. If you will, please.

(Whereupon, the witness obtained his briefcase and resumed the stand.) [260]

Q. Mr. Knack, at my request did you have some

(Testimony of Lee Knack.)

photostatic copies made of the document which you have now obtained in this case? From your briefcase? A. I did.

Mr. DeGarmo: I don't know what your Honor's practice is. I would like, if possible, to preserve out of the record the original of this contract since it is part of the company records. I have prepared photostatic copies and do we mark the original and then ask leave to withdraw it and substitute a copy?

The Court: If counsel have no objection you may use the photostatic copy.

Mr. Carey: As far as I am concerned if Mr. DeGarmo says it is a correct copy, why it is.

Mr. Etter: No objection.

Mr. DeGarmo: I'd rather Mr. Knack says it is a correct copy.

The Court: You may put in the photostatic copy.

The Clerk: Plaintiff's 1 for identification.

(Plaintiff's Exhibit No. 1 marked for identification.)

Q. Mr. Knack, I am handing you that which has been marked as Plaintiff's Exhibit No. 1 for identification. Will you examine that and state whether that is a photostatic [261] copy of the original contract between the Morrison-Knudsen Co. and the Atomic Energy Commission that I mentioned in my previous question? A. Yes, it is.

Mr. DeGarmo: I think Mr. Carey has had an

(Testimony of Lee Knack.)

opportunity to examine this but I don't believe Mr. Etter has.

Mr. Carey: Yes. I told Mr. Etter I had and he took my word for it.

Mr. DeGarmo: I want to offer him the courtesy of looking at it at least.

The Court: That is the prime contract directly with the Atomic Energy Commission?

The Witness: Yes.

Mr. Carey: Yes.

Mr. Etter: You say you have an additional one of this?

Mr. DeGarmo: I have only one more copy but I will be glad to leave this with you if you'd like to examine it.

Mr. Etter: Fine, I have no objection and I will look at this so we can move on.

The Court: It will be admitted.

Mr. DeGarmo: Exhibit 1 is offered. [262]

(Plaintiff's Exhibit No. 1 admitted in evidence, attached hereto and made a part hereof.)

Q. Mr. Knack, I want to call your attention to a specific provision of Plaintiff's Exhibit 1 which appears in the section that is entitled "Supplement A to General Provisions, Standard Form 23-A" on page 10 entitled "Prevailing Wage Rates and Allowances," and ask you if reference is made in that portion of the contract to a document known as Hanford Works Agreement? A. Yes.

The Court: What page is that?

(Testimony of Lee Knack.)

Mr. DeGarmo: It is on page 10 of a portion of the document which is entitled "Supplement A to General Provisions, Standard Form 23-A" on page 10 entitled "Prevailing Wage Rates and Allowances."

Q. Mr. Knack, will you state whether or not Morrison-Knudsen, during the year 1955, became a member of the Associated General Contractors of America, Spokane Chapter, Heavy Highway and Engineering? A. Yes; we did.

Q. Can you state the approximate time when you became such a member?

A. I believe it was in February of 1955. [263]

Q. Upon becoming such a member, Mr. Knack, what was the situation with respect to the bargaining rights for collective bargaining contracts with labor unions in the area covered by the Spokane Chapter?

A. Well, at approximately that time we had been successful contractors in bidding a job at Fairchild Air Base here. We became members of the AGC specifically to be covered by the labor agreement as existed between the various crafts and the Associated General Contractors, Spokane Chapter.

Q. Specifically did the bargaining rights which Morrison-Knudsen Co. had with labor unions remain subject to the Morrison-Knudsen jurisdiction, or did they become a part of the Spokane Chapter jurisdiction?

Mr. Carey: Just a moment. I think, your Honor,

(Testimony of Lee Knack.)

that that calls for a conclusion of law as to what the effect of a contract is.

The Court: Possibly it may. If it does I will reserve decision on it. It might be an expert conclusion regarding it. I will overrule the objection.

A. May I have it again?

(Whereupon, the reporter read back the last question.)

Mr. Etter: Your Honor, I don't want to interrupt, but I wonder if counsel would clarify it. [264] You stop me if I'm not right. As I understand it, there are two Chapters of AGC. One is known as Heavy Highway and another, a separate chapter that has to do mostly with building structure, is that correct?

A. Yes.

Mr. DeGarmo: In order to clarify that—I appreciate there is that distinction here. Unless I am referring to the building chapter I am at all times referring to the Heavy Highway and Engineering which is the only one with which we are concerned here.

A. I think in answer to the question it is necessary to be a little bit more general as the question applies to the specific instance here, because I cannot answer that the Morrison-Knudsen Co.'s bargaining rights were exclusively assigned to the AGC Chapter, Heavy Highway Chapter, because of some other factors that existed. Specifically we had been engaged in the construction project known as the Chief Joseph Powerhouse. At which time we en-

(Testimony of Lee Knack.)

tered into that some two or three years previous to February of 1955, we negotiated with the various unions a project agreement, and that work was still in progress at the time that we joined the Chapter in 1955, in February of '55, and also we had other work that was of a miscellaneous nature, I suppose one might say. But upon joining the Chapter [265] in February of 1955, all of Morrison-Knudsen Co.'s bargaining rights for work with the exception of that work which we were performing at Chief Joseph Powerhouse, all of the bargaining rights with the exception of that project were invested and turned over to the AGC, Spokane Heavy and Highway Chapter. We retained our bargaining rights on Chief Joseph Powerhouse because we had a project agreement which was written for the duration of the project, and, therefore, we retained it. It was actually written in rather peculiar fashion in that it, it was for the duration of the project or until Chief Joseph Builders, which was another contract on the dam part itself, completed their work, whichever occurred earlier.

Q. Mr. Knack, in the late fall, early winter of 1955, were you aware that a new contract was being negotiated by the Spokane Chapter with the Teamsters and the Operating Engineers? A. Yes.

Q. Did you personally take any part in the negotiation of that contract?

A. No, I did not.

Q. Are you familiar with the contract?

A. Yes, I am.

(Testimony of Lee Knack.)

Mr. DeGarmo: These contracts, if your Honor [266] please, are attached to the complaint and they are admitted, but I think for the purpose of convenience of everyone, it is better to have copies introduced in evidence.

The Court: I think it is better to have them in evidence as well as in the pleadings.

The Clerk: Plaintiff's 2 and 3.

(Plaintiff's Exhibits Nos. 2 & 3 marked for identification.)

Mr. Carey: Which is which?

Mr. DeGarmo: Will you reverse that and make Teamsters 2 and Operating Engineers 3, because we usually use the Teamsters' designation first and they are first in the pleadings.

Q. I am handing you first, Mr. Knack, that which has been marked as Plaintiff's Exhibit 2 for identification. Will you examine it and state what it is if you know?

A. This is the agreement between the Associated General Contractors, Spokane Chapter, and the Teamsters for a Heavy and Highway Construction Agreement covering eastern Washington and northern Idaho.

Q. What application, if any, Mr. Knack, to the work of Morrison-Knudsen Co. in the area covered by that agreement did that contract have? [267]

Mr. Carey: Just a moment. I object to that at the moment upon the ground that he is asking his witness to construe a written contract. I think the

(Testimony of Lee Knack.)

orderly thing to do would be to offer the contract in evidence and I have an objection to its admission.

The Court: Alright.

Mr. Degarmo: I have no objection to doing it that way. It is immaterial to me.

Q. Before offering this I am asking, handing you Plaintiff's Exhibit 3 for identification. Will you examine it and state what it is if you know?

A. This is the agreement between the Associated General Contractors, Spokane Chapter, and the Operating Engineers Local 370 on Heavy and Highway Agreement covering eastern Washington and northern Idaho.

Mr. DeGarmo: And I wish to offer Plaintiff's Exhibits 2 and 3.

Mr. Carey: So far as Exhibit 2, the Teamsters' contract is concerned, I object to its admission so far as Council 28 and Western Conference is concerned upon the ground that it appears upon the face of the contract itself that they are not parties to it.

I also object to the admission of the contract on behalf not only of the Council and the Conference, but on behalf of Local 839 as well because [268] the plaintiff in this case, Morrison-Knudsen, is not a party to the contract. The contract is between the Associated General Contractors and several local unions whose names appear on it.

Mr. DeGarmo: I think the testimony already is, if you Honor please, and which I can further supplement if necessary, that the bargaining rights

(Testimony of Lee Knack.)

with respect to this contract had been assigned to AGC Spokane Chapter and I am speaking of Heavy Highway and Building, and there is such a rule I am sure that Mr. Carey must recognize as a contract made for the benefit of the third party.

Mr. Carey: Your Honor, that is specifically what I don't recognize. I don't recognize anything that is adverse to my side of the case.

The Court: I think this witness has testified on becoming a member of the Spokane Chapter here of the Associated General Contractors that Morrison-Knudsen turned over the bargaining rights to this Association, but I think you should have more proof than that in the record eventually in view of councils's objection, to show just what this Association is and how it operated and that it did actually act for it.

Mr. DeGarmo: I have the Executive Secretary here who will be produced as a witness. I wish to [269] ask Mr. Knack a further question on the subject.

Q. Mr. Knack, referring now to—well, let's go back a minute.

Mr. DeGarmo: Do I understand that the offer of proof is not accepted at this time as the contracts, that they are——

The Court: No, I think perhaps it is sufficient for the purpose of admitting the documents into evidence, but I just made the suggestion that I would feel more comfortable if you had more proof

(Testimony of Lee Knack.)

on it which, I understood, that you were going to produce by other witnesses.

Mr. Degarmo: I was only asking because I wish to know whether I should refer to them as exhibits for identification or as exhibits, is all.

The Court: I am going to rule now. I think they should be admitted. Of course, if they are admissible as to any parties where there are multiple parties, if they are admissible to any party they should be admitted in evidence and the Court will subsequently determine their legal effect.

Mr. Carey: Is your Honor ruling on both or only on the Teamsters'?

The Court: I suppose the only one that is, that I have before me is the Teamsters'. I will admit [270] 2 then.

The Clerk: Counsel offered them both.

The Court: You did offer both, did you not?

Mr. DeGarmo: Yes, that is correct.

The Court: You should make your offer.

Mr. Etter: Your Honor, I'd like the record to show I have no objection to the admission of the contract for what it purports to be, just a contract, but I do have an objection as to the materiality of the contract and as to its effect as binding upon Local 370 on the ground already stated by Mr. Carey, that the Morrison-Knudsen Co. is not a party to the contract, and next on the ground that counsel has stated that his theory for, his theory here is as a third party beneficiary and as to that I also object to its admission on the ground the

(Testimony of Lee Knack.)

case has established that under this section of the Taft Act, it is not available to third party beneficiary.

Mr. DeGarmo: We will argue that.

Mr. Etter: But I want the record to show it, too. He is stating the position and I want the record to show it is another objection.

The Court: 2 and 3 will be admitted.

(Plaintiff's Exhibits Nos. 2 & 3 admitted in evidence, attached hereto and made a part hereof.) [271]

Mr. DeGarmo: Might I have Exhibit 2, please.

The Court: There will be a serious contention made, I understand here, that under the Taft-Hartley Act one who is not directly a party to the contract——

Mr. Carey: Yes, yes.

The Court: Alright, we will decide that when we get to it.

Mr. DeGarmo: That is an interesting point. I am willing to argue on it when we get to it.

The Court: To use the language of one predecessor, this case begins to bristle with difficulties.

Mr. DeGarmo: I assumed it wouldn't be easy sailing.

Mr. Carey: You are correct.

Q. Mr. Knack, I again ask you what application, if any, did the contract which you hold in your hand as Plaintiff's Exhibit 2, have to the work

(Testimony of Lee Knack.)

of Morrison-Knudsen Co. in the area as described in the agreement?

Mr. Carey: Just a moment.

Q. (Continuing): I am not referring to the written agreement; I am referring to what the application——

Mr. Carey: I object to that because he is now asking your Honor to rule contrary, as I see it, to the ruling you have already made. If this contract [272] is plain on its face and is not subject to explanation by defendants' testimony, certainly it isn't subject to explanation by the plaintiff's testimony.

Mr. DeGarmo: Well, I will call Mr. Carey's attention to the fact that this contract does not purport to be a contract between the Associated General Contractors which employs no one on any job, and the Unions, and in Section 3—I am reading from the wrong exhibit, but I think there is an identical provision in this one (Reading):

“It is made clear that the person signing this agreement on behalf of each employer——”

He is not signing on behalf of the AGC. (Continuing reading):

“——on behalf of each employer warrants and guarantees his authority to act for and bind each such respective employer. Each person signing this agreement on behalf of each Union, warrants and guarantees his authority to act for, bind and collectively bargain for and on behalf of such respective Union.”

(Testimony of Lee Knack.)

So this was not an agreement which purported to be between the AGC as such. It purports to be between the [273] AGC acting for employers.

Mr. Carey: That doesn't go to my objection. My objection is that if your Honor is correct, that we can't explain the scope of this contract by oral evidence, neither can the plaintiff.

The Court: If I understand it, he is not trying to explain the scope or vary the terms of the contract. He is simply wanting to know if they acted under it whether it applied to them, and I think he can testify what his company did under this contract, that is, how they operated under it without going to the legal question that counsel has in mind as to whether it should legally apply to the work at Hanford.

Mr. Carey: Just a moment again. Now may it be understood, your Honor, that in order to save you duplication Mr. Etter and I have undertaken to sort of divide the work. When I make these objections may it be understood that my objections go not only to the 'Teamsters' contract but also the Engineers'?

Mr. Etter: Unless I dispute you.

The Court: Suppose we have this understanding that it is quite usual, I think, in this type of case, whenever Mr. Carey or Mr. Etter raise an objection and makes a point here to admissibility of evidence it shall apply to both defendants, equally to each [274] defendant unless counsel indicates otherwise at the time. If you don't want it to apply speak

(Testimony of Lee Knack.)

up, otherwise I will assume that it does go to both defendants.

Mr. Carey: I can say this for your information, if Mr. Etter and I have any disputes we will settle them out in the hall in private.

Q. (By Mr. DeGarmo): Do you recall the question, Mr. Knack?

A. I think you asked me as to what applicability this contract had in relation to the work being performed or performed by Morrison-Knudsen Co.

Q. Yes, sir.

A. And my answer to that question is that after our becoming members of the Associated General Contractors, Spokane Chapter, the agreement which is here as Exhibit 2 was binding on Morrison-Knudsen Co. Our work was performed under the provisions of this agreement.

Q. I am handing you now Plaintiff's Exhibit 3 and ask you what application, if any, that agreement with the Operating Engineers had with the work of Morrison-Knudsen Co. in the area which is described in the agreement?

A. We operated under the terms and provisions [275] of this agreement.

Q. To your knowledge, Mr. Knack, have there been any instances, or what instances have there been, would perhaps be a better way to put it, if any, where any dispute has arisen between the Union and, any Union, either the Teamsters or Operating Engineers, under either of these agreements

(Testimony of Lee Knack.)

and Morrison-Knudsen Co.? I don't know that there are any. I am asking you if there were any?

A. There have been occasions in relation to some possible work in which I requested the AGC to call a meeting between the Teamsters and the Operating Engineers. And specifically that was in relation to our work at Chief Joseph because as this agreement was written in 1955 we still had some work to complete. We had roughly six months, seven months of work to complete at Chief Joseph. Therefore, as the anniversary date that we had customarily negotiated on Chief Joseph project arrived, around January 1st of 1956, I had been told and had examined the agreement and discerned that it no longer permitted project agreements. So therefore, I contacted the Executive Secretary of the AGS and requested a conference with the Unions involved in order to determine whether or not there was a possibility of our continuing to complete the seven or eight [276] months' work that we had at Chief Joseph under the terms of our project agreement rather than under the terms of the AGS agreement.

Q. Was there such a meeting held?

A. Yes, there was.

Q. And do you recall where it was held and when specifically?

A. It was held in the early part of January of 1956 in the Associated General Contractors' office.

Q. And who were present as you recall, if any one, representing either the Teamsters or Operating Engineers?

(Testimony of Lee Knack.)

A. Mr. Rossman was present, of the Operating Engineers; Mr. Hollingsworth was present from the Operating Engineers; Mr. Don High of the Teamsters was present. There were other people present from other crafts. However, my memory doesn't recall everybody.

Q. I am specifically interested in Teamsters and Operating Engineers. A. Yes.

Q. At that meeting.

A. Incidentally, I might emphasize, too, at that meeting some members, whether it constituted the full bargaining committee of the Associated General Contractors [277] or not, I do not know, but there were some members of the Associated General Contractors bargaining committee who were also present at that meeting.

Q. Now referring to this meeting which I think you stated was held on the 5th of January, 1956, will you state whether either or both of Exhibits 2 and 3 were a subject for discussion at that time and as related to work of Morrison-Knudsen Co.?

A. I don't remember the exact date of the meeting. I didn't mention that it was January 5, 1956, but it was early in January of '56.

Q. Early in January?

A. Yes, these specific agreements were part of the discussion in that the provision written into the agreement which prohibited project agreements was mentioned and applied directly in relation to our Chief Joseph project, which the purpose of the meeting had been called for, and I was informed

(Testimony of Lee Knack.)

that the project agreement could not apply and it would be necessary for these two agreements to apply until the job was completed for the seven or eight months that was involved.

Q. Were the two representatives from the Operating Engineers and the one from the Teamsters that you mentioned present at this meeting? [278]

A. They were present. However, there were others who were present, too, who my memory doesn't permit me to recollect.

Q. What, if any, contention was made at that time, Mr. Knack, that these agreements were not binding on Morrison-Knudsen Co.? I am referring to Plaintiff's Exhibits 2 and 3.

A. None whatsoever.

Q. Is there any contention that they were binding? A. Yes, sir.

Q. Mr. Knack, I have already called your attention to the contract between the Atomic Energy Commission and Morrison-Knudsen Co. I wish to ask you what relationship, if any, did the Hanford Works Agreement have to the performance of the work by Morrison-Knudsen Co. at the Hanford project under the contract?

A. By the terms and provisions of the contract which was between the Morrison-Knudsen Co. and the United States Atomic Energy Commission there was a provision contained in the agreement itself which obligated us to abide by the provisions of the Hanford Works Agreement as long as it was in existence.

(Testimony of Lee Knack.)

Q. Well, other than that contractual provision, [279] what relationship, if any, did Morrison-Knudsen Co. have to Hanford Works Agreement?

A. Outside of that provision none beyond that.

Q. Mr. Knack, from January 1, 1956—strike that please.

Will you state, Mr. Knack, whether the particular project covered by the government contract which is Plaintiff's Exhibit 1, at Hanford Works, has been completed? A. Yes.

Q. From the date of January 1, 1956, until the completion of that project, what agreement, if any, was there between Morrison-Knudsen Co., Inc., and the Teamsters Union? A. The agreement——

Mr. Carey: Just a moment, your Honor. Is counsel referring now to some agreement other than the one that is in evidence, or some oral agreement?

Mr. DeGarmo: Quite to the contrary. I want to show that is the only agreement.

The Court: Alright.

Mr. DeGarmo: I am not trying to go outside of that one.

A. (Continuing): The agreement that existed or the agreement that had been negotiated between the [280] Associated General Contractors and the Teamsters.

Q. You are referring now to Plaintiff's Exhibit 2, I believe? A. 2, yes.

Q. And what—from January 1st of 1956, until the completion of the Morrison-Knudsen Co. work at Hanford project under the contract which is in

(Testimony of Lee Knack.)

evidence here as Plaintiff's Exhibit 1, what contract was there between the Morrison-Knudsen Co. and the Operating Engineers?

A. The agreement that had been negotiated between the Spokane Chapter of the Associated General Contractors and the Teamsters.

Q. Was there any other agreement to your knowledge? A. No, sir.

Mr. DeGarmo: I think you may examine.

Cross-Examination

By Mr. Etter:

Q. Mr. Knack, as I understood your testimony, your first few answers to Mr. DeGarmo, you stated that you had been the Director of Labor Relations for Morrison-Knudsen for about three and one-half years? A. That is correct.

Q. Now that would be approximately sometime [281] in 1954 when you became Labor Relations Director, would that be right, it being now about June of 1957?

A. Yes, that was in January of 1954.

Q. January, somewhere around there. Now prior to that time, Mr. Knack, had you been in a position with Morrison-Knudsen where you were associated in some manner with the Labor Relations of that company having to do—— A. Yes, I was.

Q. You were? A. Yes.

Q. Were you the assistant then to the Labor Relations Director? A. Yes.

(Testimony of Lee Knack.)

Q. And what was his name?

A. Ray Fortune.

Q. Ray Fortune? A. Yes, sir.

Q. How many years prior to that time had you been the assistant to Mr. Fortune?

A. From March of 1952 until January of 1954.

Q. Until January of 1954. So that actually you have been working either as an Assistant Director or a Director of Labor Relations for Morrison-Knudsen since approximately 1952? [282]

A. Yes.

Q. Now I think you said, too, that you entered into a, or became a member rather, of the Associated General Contractors in February of 1955?

A. Yes.

Q. And I think you said that at that time that you became a member of AGC, that was what they call the Heavy Highway Division?

A. That is correct, sir.

Q. That is right. Now you were aware at that time, were you not, that there were two divisions of the Associated General Contractors, one the Heavy Highway Division and the other a Building Construction Division of some kind?

A. Yes, sir.

Q. Do you recall what the title of the other Chapter is?

A. Specifically I couldn't—I think it is the—I'm sorry. It is the Building Chapter is the common phrase or terminology.

(Testimony of Lee Knack.)

Q. Now you, Morrison-Knudsen—would you tell me whether or not Morrison-Knudsen has ever been a member of the so-called Building Chapter as distinguished from what we know as the Heavy Highway Division? [283]

A. In this specific area here, you mean?

Q. Yes; yes.

Mr. DeGarmo: Just a minute, Mr. Knack. I wish at this time, if your Honor please, I don't know just where this is going, this line of examination, but in order that I may not be in a position of having waived it, I wish at this time to object to the question which has been asked upon the ground that it is entirely incompetent and irrelevant and is not raised by any issues in the pleadings in this case.

Mr. Etter: Well counsel, of course, has inquired at some length about the delegation of authority of bargaining to the Heavy Highway Chapter. There may be a question here about the extent of the bargaining of the Heavy Highway Chapter and whether the extent of their bargaining goes to the particular job that as a result of which this strike was called.

The Court: I will overrule it.

Mr. DeGarmo: That, of course, goes to the question of whether they have raised any such issue by the pleadings.

Mr. Etter: You entered into it yourself by asserting your right to bring this action and liability under this contract. [284]

(Testimony of Lee Knack.)

Mr. DeGarmo: I don't care to argue it. I wish the record to show my objection.

The Court: The record will show your objection. You need not repeat it, Mr. DeGarmo, the record will show.

(Whereupon, the Reporter read back the last question.)

A. We are not members of the Building Chapter.

Q. You were not in 1955? A. No.

Q. You have not been since 1955?

A. No, sir.

Q. And have you at any time during any work that you know of that M-K has performed at Hanford? I think they had some work back there in 1947? You may not know. If you don't—

A. I don't know.

Q. You don't?

A. I mean I have heard so, but I don't know.

Q. So that with reference, the reference to membership is the membership of Heavy Highway Chapter? A. That is right.

Q. Now when you joined the Heavy Highway Chapter did you have any understanding as to the extent of the coverage or jurisdiction in work or otherwise [285] of the Heavy Highway Chapter?

A. What do you mean by the work?

Q. What did it include? Did it include building contruction? I notice they call it Heavy Highway. Just what division of jurisdiction was exercised by

(Testimony of Lee Knack.)

Heavy Highway as compared with the Building Construction Chapter?

A. Well certainly, I was familiar with what the Heavy Highway Chapter work covers in that Morrison-Knudsen Co. belongs to many Heavy and Highway Chapters in the United States and the work that is known as Heavy and Highway Construction Work is pretty much the same throughout the geography of the United States, and therefore, I would know what the Heavy and Highway work was by explicit references in the agreement itself, and also by knowledge of what Heavy and Highway construction is and the Associated General Contractors' relationship to it in Heavy and Highway Chapters throughout the United States.

Q. Well I am trying to determine possibly what, if you can tell me, what the division in the jurisdiction of the Heavy Highway Chapter and the Building Construction Chapter, I mean you have elected to join the Heavy Highway. I'd like to know the division in that jurisdiction? [286]

A. Well, the Heavy and Highway Construction work and certainly I am not able to recite all of the Heavy and Highway provisions and conditions——

Q. No, I know.

A. But Heavy and Highway Construction applies to dams, bridges, revetments, dykes, levees, flood projects, irrigation projects, hydroelectric development projects, pumping stations, athletic fields, streets, curbs and gutters, paving, underpasses, overpasses, bridges, wharves, jetties, levees, airports. Of

(Testimony of Lee Knack.)

course, as you take the divisions of projects down such as I mentioned, a hydroelectric development project, that would include the construction of a powerhouse, it would include the construction of the dam, it would include the, possibly construction of transmission lines that might be connected thereto, there could be what some people might consider buildings, offices, warehouses and so forth that are associated with that type of project; again in the building of an airport the same thing would apply to where the divisions or subdivisions of such a thing such as was commonly known as terminal facilities, which are the oil and water facilities in connection with an airport and so forth.

Q. I assume that other than that by description, [287] in other words, strictly a construction, industry building construction, that is buildings and maybe residences and otherwise that would be constructed. Have I got that right?

A. It would be building construction.

Q. In other words, probably and generally most of the construction items excluded by your statement of jurisdiction of the heavy were maybe some exceptions?

A. Well of course I think, sir, you are asking me to define a question of jurisdiction as to what constitutes Heavy and Highway by exclusion, and it most appropriately is done by inclusion. In other words, building and—I speak now in terms of what is customarily thought of across the country—build-

(Testimony of Lee Knack.)

ing construction is considered residential and commercial types of buildings that are used for shelter and that sort of thing. And customarily all work outside of that or beyond that is considered to be heavy and highway and engineering construction.

Q. Now you say, I think, that you joined AGC in February, that is Heavy Highway, in 1955?

A. Yes.

Q. Now, at that time you were aware that there was in effect an agreement between the Associated General Contractors of America as Heavy Highway Chapter [288] and the various Unions including those Unions who are defendants in this present case?

A. Yes.

Q. There was in existence—You have seen that agreement, have you not?

A. Yes.

The Clerk: Defendants' 4 marked for identification.

(Defendants' Exhibit No. 4 marked for identification.)

Q. I don't know, Mr. Knack, when you might have had the opportunity to see this agreement the last time and this inscription in ink here is somebody else's, but you will note that here it is and if you can examine it and if you can or are in a position to identify it as being an exact agreement copy of that 1955 contract?

A. Yes, that was the agreement that was in effect.

Mr. Carey: What is the date?

(Testimony of Lee Knack.)

Q. Again Mr. Knack?

A. That was the agreement that was in effect at the time that we became members of the AGC.

Mr. Etter: You mean the exhibit number?

Mr. Carey: The date of the contract. I have the exhibit number.

Mr. Etter: The date of the contract is September of 1950 extending to December of 1955.

Q. But this is the contract, is it not?

A. Yes.

Q. And after you joined, or after you became a member of the Associated General Contractors I gather from what you said, that you then informed or at least performed in your respective capacities and construction in accord with that agreement?

A. With the exception of the Chief Joseph powerhouse.

Q. With the exception of the Chief Joseph powerhouse? A. That is correct.

Q. As I understand, you had a project arrangement prior to this time at Chief Joseph so that you were able to continue that and whatever terms it might have been, but in all other respects you conformed at that time, and upon becoming a member of AGC, with this agreement then in force?

A. That is correct, sir.

Q. Is that correct? A. Yes, sir.

Q. Now, during the time that this agreement was [290] in force, that is from 1950 to 1955—

Mr. Etter: Possibly I had better offer this,

(Testimony of Lee Knack.)

your Honor, for the purpose—I don't know whether Mr. DeGarmo is familiar——

Mr. DeGarmo: I have seen it.

Mr. Etter: I'd like to offer it at this time, your Honor.

Mr. DeGarmo: Again I am a little at sea as to where counsel is going and I hardly know on what ground to object except it seems to me that we are getting beyond any issue in the case and we are going back now into an area antedating and preceding the particular time that is involved in this litigation which is the year 1956.

We were operating under '56, '57, '58 contract and the strike took place in March of 1956, and I am unable, unless counsel can point out, to see any probative value to the 1955 contract.

Mr. Etter: Well, I would like to show, if it is permissible, that in view of your inquiry, counsel, that whether or not it is the fact, that Morrison-Knudsen has complied at all times and in all respects with the AGC contract as Mr. Knack has testified up to and through the strike and after the strike until they completed the job. The [291] statement has been made that they complied strictly with this contract.

Mr. DeGarmo: If you are attempting to impeach the witness——

Mr. Etter: No, no; I just want to inquire. A few things I am concerned with here.

The Court: I will overrule your objection. It will be admitted. May I see that one please?

(Testimony of Lee Knack.)

(Defendants' Exhibit No. 4 admitted in evidence, attached hereto and made a part hereof.)

Q. Now, that contract by its terms would have expired, as I read it, on December 31st of 1955?

A. Yes, I believe that is right.

Q. Now, did you perform, can you tell me what work, if any, you performed in the State of Washington, or at least under the jurisdiction of the eastern Washington, northern Idaho Heavy Highway agreement, what work you performed other than the Chief Joseph dam and after you became a member and subject to the contract which is Exhibit No. 4?

A. Well, there was some work that we were doing at Fairchild Air Force Base out here. I am not sure of the dates that we started the construction of the bridge here in town, but I think that it was after [292] that. I mean it is difficult for me to keep dates of all the various jobs around the country. But there conceivably could have been some miscellaneous work in either north Idaho or in the eastern Washington area that we may have performed at that time or different times in the area.

Q. Well now, can you tell me whether or not, Mr. Knack, if you remember whether you did any work in what is known as the Hanford Engineer Works, if you performed any work there in the

(Testimony of Lee Knack.)

year 1955 in accord with the contract which I have submitted as Exhibit No. 4?

A. The only work that we performed at Hanford was the contract that we were awarded in November of 1955 at Hanford Works.

Q. Yes. Now, to get that, as I gather the complaint—of course you didn't draw it and you are probably not bound by it—I am going to ask you a question or two about it. As I understand the complaint, you were awarded that contract somewhere about November 24th of 1955?

A. November 25th.

Q. November the 25th. And that contract, as I understand it, is the contract, construction contract which Mr. DeGarmo has submitted as being Exhibit No. 1, [293] which I believe you examined? Is that correct?

A. Yes.

Q. Now, can you tell me at that time, Mr. Knack, when did Morrison-Knudsen Co. actually commence any work under that contract which has been marked as Exhibit No. 1?

A. The exact date I couldn't tell you, sir. I imagine that we began to employ people on our payroll in relation to this contract either the latter part of November or the first part of December.

Q. I see. Do you know actually whether any of the construction work which is indicated, and I gather from a brief description that I find in the forepart of the contract refers to pumping plant addition, 100-F area; pumping plant addition, 100-H area; office addition and modification of vent rooms.

(Testimony of Lee Knack.)

100-D area; office addition and modification of vent rooms, 100-D area; office addition and modification of vent rooms, 100-F area.

Do you know whether any of the actual work as to any of that construction was performed in 1955? That is, of November or December?

A. To say that I actually know, I couldn't say, sir, because I didn't see the work and I was——

Q. You didn't see it?

A. Wasn't on the site; no, sir. [294]

Q. So it might have been in 1955 or the actual construction work might have been early in 1956? It could have been either way as I understand it?

A. Again, of course referring back to memory and the times that jobs start and when people go on a payroll, I might be not sure of them because ordinarily I am not directly on the sites themselves and therefore I wouldn't know whether it was, the work actually commenced in the fall, in November or December of 1955, or whether it actually commenced in January. I am sorry, I can't help you on that.

Q. I see. Now, I notice in the contract, the original No. 1 of which has been admitted, I have a copy here that I have been using, that under Part IV and pointing definitely to page TC4——

A. Yes.

Q. (Continuing): ——it recites "Wage rates and allowances" and then it refers to Section 1, Section 2, Section 3, and Section 1, "Wage rates for manual construction workers as determined by

(Testimony of Lee Knack.)

the Commission to be prevailing at the Hanford site." Section 2, "Allowances for manual construction workers as determined by the Commission to be prevailing at the Hanford site." Section 3, "Minimum wage rates to be paid under the contract as determined by the [295] Secretary of Labor pursuant to the Davis-Bacon Act." A. Yes.

Q. Do you see those three, Mr. Knack?

A. Yes, sir.

Q. Now, I have specific reference to Section 2, the allowances for manual construction workers as determined by the Commission to be prevailing at the Hanford site. Could you tell me what that means?

A. I can only give you an interpretation of what it would mean.

Q. Alright, if you please?

A. The Hanford agreement itself contains certain provisions that might be called allowances. I think one of the phrases was "isolation allowance" or "isolation pay" and under the provisions of our obligation of the contract to abide by the Hanford Works Agreement, such an allowance, such allowances would be obligatory on our part while that Hanford Works Agreement was in effect by virtue of the contract itself.

Q. In other words, this Section 2 you interpret—You knew as a matter of fact that those allowances consisted of, as you say, of allowances that had been made under what was known as the Hanford Agreement, isn't that correct? [296]

(Testimony of Lee Knack.)

A. Yes.

Q. And you knew too, did you not, that the Hanford Agreement was an agreement that existed between contractors who had AGC contracts on the Hanford project with all Unions who were working on the Hanford project, did you not?

A. I knew that it had so existed at one time, but I also knew that in subsequent periods that some of the Unions that had been signatory to the Hanford Works Agreement were no longer signatory to it.

Q. Yes, but you knew that there was a special Hanford Agreement, isn't that correct?

A. Yes, sir; I did.

Q. And that it had been in effect in the Hanford area, isn't that right? A. Yes.

Q. And that that area agreement was absolutely distinct and apart from the AGC agreement?

A. I am sorry, sir, I don't know what you mean by distinct and apart.

Q. Well, you knew that there was an agreement at Hanford that was not the AGC agreement which you were operating under, isn't that right?

Mr. DeGarmo: If your Honor please, in order that we won't get into an argument later about my sitting [297] by and letting this evidence in, I am now objecting to this evidence upon the ground that they are attempting to go right behind the ruling which your Honor made excluding oral evidence as to the 1956-1958 agreement. I don't know what other purpose this can be offered for.

(Testimony of Lee Knack.)

I myself introduced into evidence the contract which states that we will abide by that Hanford Works Agreement as long as it is in effect. It is an admitted fact by admission in this case that the Hanford Works Agreement was terminated December 31, 1955. It was not in effect at any time during 1956 and that is admitted. Now, I don't know what other purpose they can have at this time by this testimony.

Mr. Etter: Well, it will certainly develop, your Honor, from their own contract that they agreed to be bound by the Hanford Agreement and were bound by the Hanford Agreement. Now, the question of whether or not there was any—well, the question of whether or not there was any breach so far as these Unions were concerned, of your AGC agreement, to me depend not only on the foundation here but on further examination that I am going to make of Mr. Knack as to his own conversations with these Unions before the men went to work, not in '55 but in 1956, in accord [298] with this statement that appears right here.

Mr. DeGarmo: If your Honor please, I think the parties are bound by the admissions. That is the purpose of them. We served a request that they admit that, as of December 31, 1955, the Hanford Works Agreement was terminated by notice in accordance with its terms. They have admitted that. The only qualification that they made to it was that there were some negotiations carried on after that, but they don't claim that those negotiations re-

(Testimony of Lee Knack.)

sulted in any contract. Therefore, as far as our contract was concerned, it states that we are bound by it only as long as it is in effect and it is admitted it ceased to exist December 31, 1955.

Mr. Etter: I am not concerned with negotiations that counsel, I believe, assumes I am talking about, and that is the matter of these different things that they argued about preceding the strike. I am now talking about negotiations that were entered into and consummated before these men went on the job in 1956 on this very project in accord with these Hanford allowances and with the acquiescence of Mr. Knack himself. Now, that is what I want to show. It happened five days after he says the contract was terminated. [299]

Mr. DeGarmo: That is the purpose I object to, upon the ground it is not plead, an affirmative defense not plead. They are relying on some agreement other than is presented by the pleadings. They must plead it.

Mr. Etter: It goes to the extent of the liability that you claim, counsel. You are on your proof now to prove that liability extended as against these unions up to the time of what he claims is a breach. Now, these people have walked in there and signed a contract, paid no attention to it themselves, how can they come in here and rely on this contract to sue us for a breach of contract?

Mr. DeGarmo: I submit, if your Honor please, if they are relying upon some attempt they claim we

(Testimony of Lee Knack.)

made, they must plead that agreement. It is not a part of our case. It is a part of the defense.

Mr. Etter: We are depending on your reliance, not on your AGC agreement at all which you now insist is what governs it.

The Court: We will recess for ten minutes.

(Whereupon, at three-five o'clock p.m. a recess was had until three-twenty o'clock p.m., at which time all parties and counsel being present, the following [300] proceedings were had, to wit:)

(Witness Knack resumed the stand for continued cross-examination by Mr. Etter.)

Mr. Etter: This might have been a little unfair to the Court in objecting to making statements, and I don't want to be, and I'm sure counsel doesn't, but I notice counsel referred to, so the Court will understand this, I think counsel will go along with me, referred—counsel takes the position the termination so-called of any Hanford Agreement, without assuming that counsel concedes any, but assuming that there was, counsel is of the position it was terminated by notice which was attached to an admission of counsel's which admissions, as I understand it, are in your Honor's file.

Now, the particular one that I have in front of me attached to the notice of the so-called termination, your Honor, will be found in a document entitled "Plaintiff's Requests for Admissions under

(Testimony of Lee Knack.)

Rule 36," which I think was filed on about the 17th of January of 1957, but it is "Plaintiff's Requests for Admissions under Rule 36" and the issue here as I see it concerns itself with the request, the several [301] last requests for admissions, one of them being indicated by an exhibit which is attached under the photo copies of Exhibits A to E, and which is entitled Exhibit F, and that is a letter dated December 29, 1955, signed by Kenneth McCaffery, Executive Secretary, in which he says that (Reading):

"The Hanford contractors negotiating committee on behalf of those contractors signatory to the Construction Collective Bargaining Agreement Hanford Works, and in accordance with its letter of October 28, 1955, is exercising the right to terminate the agreement and is hereby terminating said agreement on December 31, 1955. Then the Hanford contractors will not stop work on the project as of January 1, 1956. The contractors will maintain wages and conditions in effect on December 31, 1955, until a new agreement or agreements between the contractors and the Unions involved can be completed. The contractors, however, are not proposing, nor do they intend that any particular condition in effect between December 31, 1955, and the time a [302] new agreement or agreements are negotiated with respect to Unions would necessarily be a part of the new agreement or agreements. The wage policy of the project will remain unchanged. In accordance with past practices the committee is will-

(Testimony of Lee Knack.)

ing to accept these wage scales and effective dates which currently have been negotiated by particular craft or crafts and the association with which those Unions normally negotiate and which are prevailing in the area surrounding the project. These wages can be placed into effect as soon as agreements are completed between the Hanford contractors and the respective Union or Unions. The Hanford contractors are willing to meet, as agreed, with——”

And so on.

Now, I assume the admission of the authenticity of that document is what counsel argues is a termination notice and thereby cuts off all relations, as I gather, so far as the claimed liability here under the AGC contract which counsel has in evidence and [303] which was negotiated. Of course my position is entirely contrary. They might have said they were terminating the agreement, but they say they will continue work under all conditions until they negotiate a new contract. That is the Hanford committee on the Hanford Works.

As I see it, M-K, from what Mr. Knack has said, were obliged under the AGC contract to the Hanford Collective Bargaining Agency, which is not terminated so far as the maintenance and conditions are concerned, and yet at the same time claims now that the contract sued upon here is exclusive as governing the relations in Hanford Works.

Mr. DeGarmo: In order that my position may

(Testimony of Lee Knack.)

be made clear both to the Court and to counsel, I wish to state first that it is not conceded, in fact it is denied that the Hanford contractors negotiating committee of which Mr. Kenneth M. McCaffery was Executive Secretary, had any agency or other relationship with Morrison-Knudsen Co., Inc. We had never been a party to the agreement. We were not represented by it in any way, and any letter or statements that they made in the letter which counsel has called to your Honor's attention, as far as we were concerned, was not within our, any authority granted by us, and was not made for [304] us.

The only reason the letter was presented was because it was a notice by which the Hanford Works Agreement—and if you will refer to the contract with the government, our agreement was to abide by the terms of the Hanford Works Agreement entered into by the Hanford contractors negotiating committee, but the Hanford Works Agreement, that this letter terminated it.

Now counsel, I know, has overlooked temporarily at least, this further answer by the plaintiff, or by the defendants to the request for admissions. In our original request for admissions No. 13, we asked them to admit that at no time since January 1, 1956, has there been in force and effect any agreement providing for the payment of, by plaintiff or by the terms of which plaintiff was obligated to make or pay contributions towards the health and welfare of any of the defendants, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Help-

(Testimony of Lee Knack.)

ers of America, Local No. 839; Joint Council of Teamsters No. 28, or Western Conference of Teamsters other than the agreement which was attached to the original complaint herein as Exhibit A.

Now, in answer to that this is their answer. [305] They say (Reading):

“Answering request 13, Defendants, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 839, Joint Council of Teamsters No. 28, or Western Conference of Teamsters, admit that the contract in force prior to January 1, 1956, and applicable to the Hanford area, was canceled as of December 31, 1955, by notice given by the Hanford contractors negotiating committee through Kenneth M. McCaffery, its Executive Secretary, and that no substitute contract became effective relative to said area between January 1, 1956, and the date of the work stoppage referred to in the plaintiff’s amended complaint, and these defendants deny that the contract attached to plaintiff’s amended complaint as Exhibit A, had or has any application to the work to be performed within the Hanford area.”

Now, Mr. Etter was one of the parties to these admissions and my objection was that they are attempting now to [306] rely apparently upon some alleged oral statement or agreement which they claim was made at some pre-job conference and they have not alleged any such agreement as a defense in this action, nor have they in their request

(Testimony of Lee Knack.)

for admissions reserved any such agreement. In fact, they say to the contrary that there was no substitute agreement, and I think that they should not be permitted to show such an agreement or attempt to show it without at least having pleaded it.

Mr. Etter: I should like to show your Honor that now in view of what we both said, I should like to show that as far as Morrison-Knudsen was concerned, that after it signed or after the AGC executed the so-called contract in November, or rather December, I think it was, November, I guess it was, of 1955, that they proceeded to work on the project not in accord with the AGC contract at all, but in accord with the Hanford negotiating contractors, Hanford Agreement that they proceeded to work under that agreement, never did work under the AGC contract at Hanford.

In other words, after they signed the agreement they didn't say, we have an AGC contract now and here is what you fellows are going to do. We have a new contract with you down here, and they claim they have a [307] new contract down there a month before they terminate the Hanford Agreement, and yet after that they proceed to work under the same agreement that Mr. McCaffery refers to here and under the same conditions that Mr. McCaffery refers to.

They never did exercise what he says is a—my point is, if they, themselves, didn't recognize after this contract was negotiated AGC, any liability as

(Testimony of Lee Knack.)

far as these people and proceeded under another contract, how can they reverse themselves now and assert that there is liability under this contract? I mean, they can't waive even assuming that they intended it to apply to Hanford, they can't waive that and proceed under the Hanford contract and then come in and say this was the one that was breached.

That is my position. That is what I am attempting to show through Mr. Knack who handled all the negotiations.

Mr. DeGarmo: Whatever is the affirmative defense has not been pleaded.

Mr. Carey: May I, your Honor, I am confused about just what the state of the record is about these demands and answers. I don't know whether your Honor has gone through this voluminous file. After the pleadings were made up, and I am referring now to [308] the amended complaint and the answer, we served demands for admissions under Rule 36. Those were answered. They are in the files. The plaintiff then served some demands for admissions on the defendants. We answered those and those are in the file.

Subsequently and quite recently we served some supplemental demands for admissions and they answered those, and they in turn served some supplemental requests and we answered them, so that there are four sets of demands and answers that I assume are on file. If they are not on file it is Mr.

(Testimony of Lee Knack.)

Etter's fault because I sent them to him and asked him to file them.

Now, the question is, under your Honor's practice, those being on file are they considered a part of the record or are we under the necessity of reading the demands, or I think we ought to have some understanding about it because reference is going to be made to them continuously.

Mr. DeGarmo has already referred to these demands and answers and so has Mr. Etter.

The Court: I think that the request for admissions and the answers to them are in the same status as the pleadings. That is supposed to set up that fact without the necessity of offering [309] proof regarding it, and the same thing, I think is true here. If the requests are in the file and the answer is there, it is before the Court and can be considered on counsel's calling it to the Court's attention the same as you would the admissions in the pleadings. It isn't necessary to put your pleadings in evidence.

Mr. Carey: It is agreeable to me if it is agreeable with Mr. DeGarmo and Mr. Etter.

The Court: These requests and answers are in the file and binding on the parties making admissions.

Mr. DeGarmo: I have had that question up before and I find the Courts are not uniform on their ruling because there is no rule on the subject.

The Court: No, the rule doesn't cover. It is a matter of local practice.

(Testimony of Lee Knack.)

Mr. DeGarmo: Local Court rule apparently!

Mr. Carey: Well, I suppose we can, whatever the rule be elsewhere, I suppose we can agree, if we can agree.

The Court: I have no objection to your reading them into the record or having them copied into the record if you wish, but that hasn't been my practice to do that here. I have just left them [310] as I would the pleadings in the file, and they are there for what they show and for what they are worth.

Mr. Carey: May I make this further inquiry then. I don't suppose your Honor has had the opportunity to read these in detail?

The Court: No, I haven't.

Mr. Carey: Because I anticipate that it has already developed that objections will be made on the basis of what are in these and I don't see how your Honor can very intelligently rule on any objections if you don't know what—

The Court: Well, I think in the particular instance where they are used as a basis of objection, or counsel wants to use them as a basis for a factual foundation for some argument, that they should be specifically called to the Court's attention.

Mr. Carey: Anyway, the present situation as I understand it, they are regarded as part of the record as if they had been read?

The Court: Yes.

Mr. Carey: In detail.

Mr. Etter: That is agreeable to the Engineers.

(Testimony of Lee Knack.)

Mr. Carey: That clears it up.

The Court: Well I think that counsel will be permitted to show, if he can, or inquire at [311] least along the line of showing that this contract which, or these contracts, rather, which are in evidence as Plaintiff's 2 and 3, were not actually used or applied to Hanford Works which is the basis of this suit.

Mr. Carey: Yes, that is the point.

Mr. DeGarmo: May I have a continuing objection?

The Court: Yes, the record may show you have a continuing objection without repeating each time.

(Whereupon, the Reporter read back the last question on cross-examination by Mr. Etter.)

Mr. DeGarmo: I'd like to have the time, about whether we are talking about '55, or '56?

Mr. Etter: 1955.

A. Yes, I knew there was a Hanford Works Agreement.

Q. In 1955? A. In 1955, yes.

Q. And you knew too, did you not, that there was a Hanford Works Agreement then in effect when you, when your company bid this particular job that is described and set out in Exhibit No. 1?

A. Yes. [312]

Q. And as a matter of fact, M-K was well aware there had been a Hanford job agreement for many, many years prior to the time that this was bid,

(Testimony of Lee Knack.)

isn't that true?

A. I don't know what you mean by many, many years, sir.

Q. Well, you knew it all the time that you had been in the Labor Relations Department of Morrison-Knudsen, did you not?

A. Well, I knew that the Hanford Agreement, as such, had come into existence, I believe, in the later summer, was completed in 1952, so that would have been between the time that we bid the job and the time that that work agreement was in effect was three years and I was curious as to what many, many years might mean in relation to three years.

Q. You knew then three years then, is that not correct?

A. Yes, that is correct.

Q. As you indicated, Section 2, Allowances on TC4, Exhibit 1, had reference to factors in this Hanford Agreement as to isolation pay and transportation?

A. I said I interpreted them as such, yes.

Q. You were a party to the AGC contract which is [313] in evidence between the plaintiff and the defendant Teamsters and Engineers?

A. Yes.

Q. You, as I understand it, you were parties to that agreement having joined AGC?

A. Yes.

Q. And as I recall it, those agreements, checking now to make sure with the complaint, I believe that the agreement with the defendant Teamsters was negotiated and entered into on December 19th of 1955? I am referring now to the AGC agreement.

(Testimony of Lee Knack.)

A. Yes.

Q. And that the agreement which is attached as Exhibit B was negotiated and entered into with the Engineers No. 370, defendants, under date of December 24, 1955? A. Yes.

Q. That is right. Now, when you entered into those agreements or rather, when AGC Heavy Highway entered into those agreements you were then aware however, you were still aware of the Hanford Agreement which was in effect, were you not? A. Yes.

Q. Alright. Were you aware that on December 29th of 1955, a Mr. Kenneth McCaffery, who purported [314] to be the Executive Secretary of the Hanford contractors negotiating committee sent a letter that has been read here dated December 29th of 1955, to certain Unions who had work or prospective work or were working on Hanford including these defendant Teamsters here and Engineers?

A. I didn't know it at that specific date. I knew it subsequently.

Q. When did you first learn of it?

A. To know that it had actually been sent I think it was on the 4th day of January, 1956, that I knew of it.

Q. On the 4th day of January, 1956?

A. Yes.

Q. Now, do you recall whether or not you, along with Mr. Reed, who I believe is a project manager for M-K, attended a pre-job conference meeting

(Testimony of Lee Knack.)

with a number of labor representatives in Pasco, Washington? A. Yes, sir.

Q. And do you recall the date of that meeting?

A. Yes, I do. As a matter of fact, on that particular date I was in attendance in two meetings that involved certain labor representatives. One of them was at the AGC offices and the other in [315] the morning of the 5th of January and the other was at Pasco at the Labor Temple on the afternoon of January the 5th.

Q. That was correct, it was January 5th of 1956, was it not? A. Yes.

Q. And in attendance at that meeting besides you and Mr. Reed there were representatives of various craft unions and including representatives of the defendants here, that is the Teamsters and the Operating Engineers?

A. I recollect that there was a representative of the Operating Engineers. I don't specifically recollect whether or not there was a representative of the Teamsters. There very easily could have been without my recollection because as I recall there were perhaps fifteen or twenty various representatives.

Q. There were approximately fifteen, were there not?

A. Somewhere in that neighborhood; yes, sir.

Q. Do you recall that Mr. William Dunn, who was a business representative of the Engineers was the Chairman of the meeting? A. Yes.

Q. That is right. You are also acquainted, are

(Testimony of Lee Knack.)

you, [316] with Mr. Charles Knapp who is seated over there on my right? A. Yes.

Q. And who has acted down there for the Building Trades Section for many, many years I understand? A. Yes.

Q. Now, do you recall a conversation that you held with Mr. Knapp and with these other men and in their presence near the conclusion of that meeting at which you discussed the Hanford Works Agreement and particularly the isolation pay and the transportation provisions of the Hanford Agreement—

Mr. DeGarmo: I wish again, your Honor, in order to make the record very specific, I object to this question upon the ground that they are now attempting to prove some oral agreement outside of the written agreements, Exhibits 2 and 3, and not having pleaded or relied upon it in the pleadings in this case.

The Court: I will overrule the objection.

A. The question of the Hanford Agreement and the status of the Hanford Agreement came up for discussion in both of the meetings which I attended that day.

Q. I am not concerned at this time with [317] the meeting—was it the AGC?

A. In the AGC offices with the Union representatives and other contractors.

Q. I'd like you first to have recollection of your discussion about the Hanford Works Agreement at the meeting in the Labor Temple with the men that

(Testimony of Lee Knack.)

I have referred to or described, on the afternoon of the 5th of January.

A. Yes, I recollect that discussion.

Q. And will you tell us what that was?

A. Well, the events leading up to the discussion itself were associated to some degree with the discussions that had occurred in the morning.

Q. I see.

A. And it is difficult to have the one discussion that occurred in the afternoon explained without the association with the morning discussion because some of the people who were in the afternoon meeting were not present at the morning discussion, and some were present at both the meetings. At the meeting in the morning the question of status of the Hanford Works Agreement was being discussed. We were, both Mr. Reed and myself were asked to sit in on those meetings merely to be conversant with what the conditions and circumstances were that prevailed at the [318] moment. I had actually come to Hanford as a part of a request that had been given to Mr. Reed by the Building Trade Council for pre-job conference. Therefore, I was there for that purpose and the meeting in the morning was being held. In the morning meeting the Hanford committee, at least it was what I took to be the Hanford committee, was talking with the Union representatives and the question came up as to the status of the Hanford Agreement, and I was not familiar, or wasn't certain just where it did stand as it appears that some of the people in the

(Testimony of Lee Knack.)

room wasn't too sure about it. And I remember very definitely stating that in so far as Morrison-Knudsen Co., Inc., was concerned, that we were in the meeting as observers only, that we were not being represented by the Hanford committee, that we did have an agreement with the crafts who had signed with the AGC up to that moment and we considered that agreement to be in effect.

We certainly recognized it as being binding upon us and we considered that it was binding upon those parties who had also consummated the agreement with the AGC.

Now, in that morning's meeting there was a considerable discussion between the Unions and [319] the contractors apparently the Hanford negotiating committee as to the status of the notification of termination, as to actually when was it going to terminate, were there going to be future meetings. References and discussions were made pertaining to some continuance of conditions that existed under the Hanford Agreement, so that actually to one who was not fully conversant and hadn't been sitting in prior meetings, it was impossible to tell whether or not the Hanford Agreement from a practical or application standpoint was totally and completely terminated.

Subsequently, in the afternoon, we attended the meeting in Pasco. A considerable portion of that meeting was taken to describe the type of work we were involved in, questions by the Unions as to which subcontractors and the names of subcon-

(Testimony of Lee Knack.)

tractors which we might be using on the project, the method and procedure that we would follow in dealing with the Unions, and not from a contractual standpoint but from a day to day standpoint, the possible discussions over judicial problems that might arise on the job, and so forth. The general type of discussion which occurs at a pre-job conference.

Now, I was asked the question, as I recollect, in that afternoon meeting specifically what was [320] Morrison-Knudsen Co. going to do. And I pointed out again, as I had in the morning meeting, that we did have agreements with certain crafts by virtue of the agreements through the AGC which was our bargaining agent and which we recognized and honored such agreements.

The question came up as to the circumstance involving the issues at stake, primarily this travel time, the isolation pay and so forth. And I indicated that because of the area which still had to be explored, which was obvious that there may be some continuing meetings and because there was no apparent immediate crisis involved, that certainly Morrison-Knudsen Co., Inc., was not in any position to be pushed by the Unions, by the line, so to speak, and that we were not going to make a commitment one way or another in view of our contract until a definite determination had been made in relation to the conditions involving the Hanford Works Agreement.

Now, at the time that, on January 4th, which was

(Testimony of Lee Knack.)

the day preceding the meeting that I had learned somewhat of the communications that had been sent around, the one you referred to specifically, Mr. McCaffery, the questions of the technical termination, the questions of the relationships henceforth [321] between the Unions and the Hanford contract or committee, was definitely one that was up in the air at the time that we had our meeting on the 5th of January and I think I was very explicit in pointing out that certainly we could not be expected to become "the tail that would wag the dog" nor could we be expected, as I said before, to be put in it by the line of the circumstances, and certainly there were certain factors that had to be gone through there. And therefore, we could not usurp.

Q. Do you know Mr. Knapp who is seated over here? A. Yes, I do.

Q. Do you remember that at that meeting he directed the specific question to you after explaining that there was talk and that there was difficulty as you have indicated about this Hanford contract and that there was talk of attempting to withdraw certain provisions of that agreement that did not apply outside the barrier, and he named them particularly, isolation pay and transportation, and he asked you what would be your position with respect to those provisions in the Hanford Agreement, and that you said to him, "We intend to go along with those provisions of the agreement and we are going to pay the isolation [322] pay and not

(Testimony of Lee Knack.)

only that, but we are going to provide the transportation''?

A. No, I don't recollect that as a specific situation at all as a question being put to me.

Q. Do you recognize anything about that that now recalls to your recollection that there was any discussion about the matter of those provisions of the Hanford Agreement at that meeting with Mr. Knapp and these other men there?

A. There was a question as to whether or not, whether the isolation pay and some of the other provisions, the transportation provision, the two, in the Hanford Works Agreement was going to be continued or discontinued, and certainly that was something that I couldn't put a time limit or a date limit on because I didn't know and was not affected or a part of the Hanford negotiating committee.

Q. Didn't you say though that you were going to, you were going along with that Hanford Agreement and pay the isolation pay and pay the transportation regardless of what?

A. No, I think specifically, sir, I made reference to the fact that under the terms of our agreement we were obligated to live under the Hanford Agreement until it ceased to exist and at the [323] current moment there wasn't anybody who could say when that was going to cease to exist as conditions prevailing and certainly, I was in no position to be the party in the face of several contractors and other people involved in there.

(Testimony of Lee Knack.)

Q. Then you did say that you would be bound by the Hanford Agreement until it ceased to exist, did you not?

A. By virtue of our contract; yes, sir.

Q. Which contract is that?

A. By virtue of our contract with the Atomic Energy Commission.

Q. In other words, you recognized the existence of the Hanford Agreement?

A. Until it ceased to exist.

Q. Until it ceased to exist?

A. Finally and completely, yes.

Q. And on January 5th when you had this meeting as far as you were concerned it had not ceased to exist, had it?

A. As far as I was concerned in official capacity basis certainly I had not had any indication that it had ceased to exist, no. It was a moot question.

Q. Now, as a matter of fact, did you not commence [324] your work on the project immediately after that?

A. We had commenced prior to that time, sir. We had actually employed before that.

Q. Is it not the fact that you provided isolation pay during the time and up until March the 2nd, 22nd, and isn't it a fact that you also paid bus transportation, furnished bus transportation to both of the defendant Unions in accord with those provisions which were in the Hanford Agreement?

A. Yes, sir.

(Testimony of Lee Knack.)

Q. That is right. And neither one of those provisions was in the AGC agreement, isn't that right?

A. No, sir. Well, now, there was a provision in the AGC agreement providing for travel time; yes, sir.

Q. I know, but I am talking about—well, there wasn't one for isolation pay?

A. Not as such, no.

Q. Not as such. Now isolation pay was a peculiarity and a specific of the Hanford contract, was it not? A. Yes, sir.

Q. And the two elements that they were concerned with, even though AGC might have had a comparable one in their contract, was the transportation and was [325] the isolation pay?

A. That is correct.

Q. And you continued to provide those as you have said? A. Yes, sir.

Q. Now, of course at the commencement of, I mean beginning with January the 1st you then had a contract, or rather you were then a member of the Associated General Contractors Heavy Highway and Construction Division, were you not?

A. Yes, sir.

Q. And commencing on January the 1st as I understand this contract, it became effective on January 1st, is that right? A. Yes, sir.

Q. Did you at any time after January the 1st advise any of the defendant Unions here or any other Union that might have been working for you, that you were now working under the Hanford, or rather under the AGC agreement and that you did

(Testimony of Lee Knack.)

not recognize the existence of a separate Hanford Agreement that applied to the Hanford project?

A. I think that we did give notification to that effect shortly after the work stoppage occurred; yes, sir. [326]

Q. I mean prior to the work stoppage did you give notice of that?

A. You hadn't mentioned that before.

Q. Yes, prior to the work stoppage did you say anything to any of these defendants that they were now under the AGC contract which did not provide for isolation pay?

Mr. DeGarmo: I'd like to have the question, Mr. Etter, in order that I may understand the answer of the witness. When you say "you" are you speaking about "you, Mr. Knack" or are you speaking about Morrison-Knudsen Co.?

Mr. Etter: I am referring to M-K. I understand he was Director of their Labor Relations.

Mr. DeGarmo: I just want to be sure Mr. Knack understands that when you say "you" he is talking not about Mr. Knack but about everybody in Morrison-Knudsen Co.

Mr. Etter: Not everybody, somebody with authority, and I assume being an expert he would know what was going on in the Labor Relations.

Mr. DeGarmo: A corporation does not act through one individual.

Mr. Carey: My observation, your Honor, is that the witness is quite intelligent. He [327] understood the question.

(Testimony of Lee Knack.)

The Court: Proceed.

Q. In other words, I am not, so we understand each other and Mr. DeGarmo understands, I am not saying "you" on each of these occasions probably do every one of these things, but I am talking about your company and I understood you had quite a bit of authority as Labor Relations man to handle their problems, is that right?

A. Yes, sir. However, you see when we assign our bargaining rights to an association, when matters of this nature come up we don't take off on our own. We recognize the bargaining factors and frankly, when the situation becomes embroiled as it did, it was our bargaining agents that acted in our behalf in relation to this matter.

Q. Yes. Well fine, and dandy. But nevertheless, do you know whether or not anybody from Morrison-Knudsen, you or anybody else with any authority ever advised these unions by any communication, oral or otherwise, that you were proceeding under the AGC Agreement and that it applied to the Hanford project, did you ever do that?

A. I think the parties involved and certainly, because I was not present when it may have occurred, but [328] on the basis of what I was told, I think that the parties involved were so told by our bargaining agent which is the AGC.

Q. Well, at the time, as I understand it, the AGC didn't enter into negotiations with these Unions until sometime after the 6th of January, did they?

(Testimony of Lee Knack.)

A. Well, as to the specific dates that the AGC inserted itself in there, I couldn't say sir, but I am quite certain by virtue of phone calls and so forth, that I received, that the AGC had been in the matter before the work stoppage had occurred and conferences and talk had occurred between them.

Q. That is right, but as of January 6th, and for sometime after that the AGC wasn't doing any bargaining for you on the Hanford project, were they?

A. Sir, by virtue of the contract that we were bound by, I was in no position, and the contract that we had with the AGC would not permit me to enter into any special agreements.

Q. Well now, Mr. Knack, didn't you sit in a couple of times as observers at meetings between these various Unions and the Hanford contractors negotiating committee after January the 6th?

A. No, sir; I did not.

Q. You did not? [329]

A. I did not, sir.

Q. I see. And you were at no meetings between the Hanford committee and the Unions?

A. The only time I sat in at a meeting as an observer was on January 5th, 1956.

Q. January 5, 1956?

A. Yes, sir.

Q. Alright now, at that time, or rather, you continued, as you have said, to pay the isolation pay and so forth. Now, when did the work stoppage occur?

A. I believe on March—the exact date I'm sorry I can't tell you.

Q. Do you recall whether or not on the day pre-

(Testimony of Lee Knack.)

ceding the work stoppage the Hanford committee had posted notices that they would no longer, their members would no longer pay isolation pay nor supply transportation?

A. That I wouldn't know, sir, because I was not on the site at that particular time. I have no knowledge of notices.

Q. Do you know whether or not after that notice was posted, whether Morrison-Knudsen continued one day or more to pay isolation pay and to provide bus transportation?

A. Well, sir, not having knowledge of the [330] notice I certainly couldn't tell you what would have occurred subsequent to the notice.

Q. I see. You don't know that?

A. No, sir, I don't.

Q. Have you had occasion to try to determine it?

A. Pardon me?

Q. Have you had any occasion to determine that before you came here today?

A. No, sir, I have not.

Q. I see. Do you know whether or not any representative of Morrison-Knudsen received a call from the Associated General Contractors or a representative of theirs after this work stoppage had occurred and after Morrison-Knudsen had continued to pay isolation pay and supply bus transportation, complaining about Morrison-Knudsen having anything to do with that in view of the other attitudes of the other contractors in withdrawing?

A. Well, sir, not having knowledge of the ques-

(Testimony of Lee Knack.)

tion that, a portion of the question, I certainly wouldn't have knowledge of the other portion of it either.

Q. I imagine you do.

A. I certainly don't know.

Q. You can say no if you wish or you can [331] say yes. Now, this agreement that I handed you here a moment ago, Exhibit 4, 1950 to 1955, refers to the work and territory affected. Do you notice that in Article I? A. Yes.

Q. And the agreements that we have here, rather the agreements submitted by counsel, 2 and 3, also contain, do they not, the same clause in both of the Articles, territory and work covered? I am referring to 2 and 3.

A. There is some slight difference in the language.

Q. In the language, but I am talking about the territory described, the counties in Washington described. Will you tell me if those are the same in all three exhibits?

Mr. DeGarmo: I think the documents speak for themselves. It is just a waste of time to ask the witness to compare them. A. They appear to.

Mr. Etter: Do you have an objection, counsel?

Mr. DeGarmo: Yes. I am objecting on the ground the documents speak for themselves, whether they are the same or not.

A. (Continuing): They appear to be the [332] same.

(Testimony of Lee Knack.)

Q. Benton County is in each one of them, isn't it?

A. Yes.

Q. And this agreement, of course, as you have indicated, was in force and effect and you became a party to it in 1955, from 1950 to 1955?

A. It was in force and effect and we became bound by it as of February, 1955.

Q. I see, and all of them say Benton County?

A. Yes, sir.

Q. And when you became a party to the AGC agreement in 1955, you knew, as you have stated—I don't know whether you have stated, but you knew there was a Hanford Agreement?

A. Yes, sir.

Mr. DeGarmo: I think that is established. I think he has answered that about four times.

Q. Now, after this work, you stated that, I think you said that you worked in accord with the AGC agreement I think your statement was, at all times after you became a member of AGC. Is that your testimony?

A. With the exception of the special project agreement that we had at Chief Joseph Dam, the powerhouse.

Q. Well, you didn't work in accord with the AGC agreement the first two or three months at Hanford, [333] did you?

A. Which two or three months do you mean, sir?

Q. Well, January, February, up until March when there was a work stoppage?

A. Well actually when we were working, started work then and began to hire people we were

(Testimony of Lee Knack.)

working under the Hanford Agreement by virtue of our contract.

Q. That is right, you weren't working then in accord with all of the terms of the AGC agreement, were you?

A. I don't think that—let's say this again, that we were working in conformance with Hanford Works Agreement under the provisions of our contract.

Q. Under the provisions of your contract with the Hanford—

A. With the Atomic Energy Commission.

Q. That is right, not under AGC? You can answer that yes or no, I think.

A. Well, in toto yes, we were not. However, by virtue of the way the negotiations were going on in part, the negotiations of the AGC were effective on the Hanford project, too.

Q. Oh, yes.

A. So there was an inter-relationship because the negotiations that were completed with the AGC wage [334] which also affected them, so I would have to say in answer to your question that we were working in accordance with both agreements because of their inter-relationship.

Q. Surely the AGC scale, the prevailing scale was the same on Hanford, wasn't it?

A. The AGC scales and the Hanford scales were those crafts the AGC negotiated with were the same.

Q. Yes, that is right, but in addition there was

(Testimony of Lee Knack.)

the traditional isolation pay and transportation, wasn't there, under the Hanford Agreement?

A. Yes, sir; yes, sir.

Q. And you paid that, did you not?

A. Yes, sir.

Q. And after the work stoppage the work was resumed after the hearings and one thing and another, isn't that correct?

A. Yes.

Q. Now, when you resumed work did you continue to work, did you continue to pay the isolation pay, did you continue to pay it, continue to provide transportation?

Mr. DeGarmo: Just a minute, if your Honor please, now we are getting into a field that I think we should have some cutoff on here. There was a [335] panel hearing on this thing to which we were not a party, but we are involved in it and the panel made a recommendation which was followed under protest and we say that we followed it because—and we have pleaded this in our pleadings—that we followed it because we were told if we didn't we were going to have a strike. In other words, they would not go back to work unless we followed the recommendations. We have sued in this action for all of the payments that we have made in accordance with that same panel recommendation and which we had to, we had shoved down our throat under the threat that if we didn't accept it the strike would continue to go on. Now——

Mr. Etter: Is it your statement to this Court

(Testimony of Lee Knack.)

that the panel told you there would be a strike continued if you didn't accept their recommendations?

Mr. DeGarmo: I am saying the Unions told us that your client and Mr. Carey's client told us unless we accepted that there would be a strike and we are going to be prepared to prove this in Court. We are going in it now why we paid it afterwards. Counsel knows why we paid it.

Mr. Etter: I didn't ask why, I asked him if he did pay it. You can explain why if you want to.

Mr. Carey: Mr. DeGarmo's statement now [336] answers his own objection. He says they are going into it, the very matter that Mr. Etter is inquiring about.

Mr. DeGarmo: I will withdraw the objection.

Mr. Carey: We don't agree it may be withdrawn.

Mr. DeGarmo: It goes to the question of liability, my objection is it goes to the question of the amount of damages not to the question of liability, and we are just getting into an issue that is going to lead us down a long trial here and get us no place.

The Court: Well, go ahead. The objection has been withdrawn I think.

Q. You finished the job by continuing the pay and providing the transportation as I understand it? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. Now, do you know, rather, as I understand

(Testimony of Lee Knack.)

it, the contract or the terms or conditions under which the Unions were working from January the 1st up until the time of the dispute, whatever it was, were combination of conditions, in other words, combination of provisions of the AGC contract with certain added benefits provided by the Hanford Agreement? [337]

A. Basically I think that is so.

Q. Basically that, isn't that correct?

A. Yes.

Q. Can you tell us what the Unions did at the time of this work stoppage that was a breach of any of the conditions of AGC that were being applied there or any of the conditions that the Hanford committee had extended in this letter which appears in the exhibit, in the pleadings, that I read to His Honor? Can you tell us anything the Unions did that violated any part of those combined agreements?

Mr. DeGarmo: I object to that upon the grounds that they have not shown that we are any party to the Hanford Agreement negotiating committee or to the commitments which were made, if you want to call them commitments, in the letter of December 29, 1955, which terminated the Hanford Works Agreement. He is assuming that we were a party to that, and I don't think there is any proof of that as yet.

Mr. Etter: I don't know. Mr. Knack's testimony has been that you proceeded to work and worked there for almost three months under combined AGC

(Testimony of Lee Knack.)

contract with the added benefits of the Hanford contract, and I merely asked him what condition of either of the contracts the Unions breached. What did they do. [338] You pray action here for a breach of contract. What did they do?

Mr. DeGarmo: That was no contract as far as the Hanford contractors negotiating committee and Morrison-Knudsen Co. is concerned. That is the basis of my objection. He assumes it was a contract. My objection is that he has not shown there was one. He is assuming that there was one.

The Court: I think that objection is well taken. He is asking though about what breach there was of the Associated General Contractors contract which certainly you are relying on.

Mr. DeGarmo: He can ask that.

Mr. Etter: He says there was no contract, your Honor. The very letter that McCaffery sent, we terminate but we are going to continue, he said, to work under this same contract until we negotiate a new one.

The Court: I don't think any contractual relationship has been shown between this plaintiff and the Unions under the so-called Hanford project. Where is there any evidence that they became signatory to any contract of that kind?

Mr. Etter: There is no evidence it became signatory to it. They just adopted it and used it [339] and the Union worked under it.

The Court: Because they continued to pay? Is it your contention because they continued to pay the

(Testimony of Lee Knack.)

isolation pay and certain transportation benefits that they thereby adopted——

Mr. Etter: Oh no, certainly not, but he has already testified that in 1955 when they went in there they were subject to the Hanford Works Agreement by virtue of this very contract that is here. He said, "We were subject to that." If they were subject to that and McCaffery didn't terminate it, aren't they bound to the extent that McCaffery's letter indicates?

The Court: Is it your position it wasn't terminated by the letter?

Mr. Etter: Absolutely it wasn't terminated.

The Court: You wish to amend your answer then to the interrogatories?

Mr. DeGarmo: I'd like to know that, too.

Mr. Etter: We admit, I think, that he sent a termination notice.

The Court: I thought you admitted they were terminated?

Mr. DeGarmo: They did admit there was no other agreement in effect. If they are going to come into court after those answers and try to make that [158] change——

Mr. Etter: I will state this: There was no other agreement.

Mr. DeGarmo: I——

Mr. Etter: Just a minute, Mr. DeGarmo, I don't think we need your comments. Yes, they terminated qualifiedly to this extent: They said, "We have terminated this agreement as of this date." But Mc-

(Testimony of Lee Knack.)

Caffery adds on in the next paragraph, "This doesn't mean that we are not going to continue to carry out the terms of this contract and negotiate a new one. We are going to be on the job and we want you people to come on the job and we will go along as we are until we negotiate a new one."

If he said that and the defendants here, the Unions, went along even though termination of that date, if the Unions went along on everything he proposed they go along on, and then McCaffery and his people did something to violate his commitment in the letter, how could we be guilty of breaching a contract? That is the point I am trying to get at here.

The Court: Well, you may proceed.

Mr. DeGarmo: My point is that as far as Mr. McCaffery is concerned, he had not one iota of [341] authority from Morrison-Knudsen Co. at anytime. You have never shown any.

The Court: Alright, go ahead. I will get the evidence first and then pass on the question that is presented.

Q. Well, you have answered this maybe ten times, but in view of your argument, were you not subjected to the provisions of the Hanford Agreement by virtue of this contract which is Exhibit 1?

The Court: That has been brought out. No question about that.

Q. (Continuing): Are you familiar with any other of the AGC contracts, Highway contracts with various companies and with the Unions further

(Testimony of Lee Knack.)

back than the agreement which is in evidence as I submitted there, for 1950 and 1955, Exhibit 4?

A. No, sir; I am not.

Q. Have you ever had a chance to examine any of them?

A. No, sir; I have had no reason to.

Q. And have had no reason to, and they are not in your files and you have not examined them?

A. They may be in my files, but I have had no reason to examine them.

Q. I see. [342]

Mr. Etter: Thank you, Mr. Knack. I think that is all.

Mr. Carey: I have some cross-examination I anticipate will take approximately half an hour.

The Court: We will quit then until tomorrow morning at ten o'clock.

Mr. Carey: Before your Honor leaves the Bench, I don't want to unduly press either the Court or counsel on those jurisdictional matters, but again I want to call your Honor's attention to the fact that I have one and possibly two witnesses here that I will have to hold if your Honor holds in the Joint Council, and also if we—when I say “we” I mean the Council and Western Conference—if we are going to be a party to this at the end, I have got to arrange for one and possibly two witnesses that have to come from Seattle. So if your Honor is not prepared to rule on that now——

The Court: Mr. DeGarmo, I understood, told me his associate was examining your authorities and he

will let me know in the morning whether or not he agrees. If not, I should hear your presentation of it at that time and make a decision.

Mr. Carey: Very well, thank you.

The Court: Before we proceed with any [343] more testimony.

(Whereupon, Court was recessed at four-twenty o'clock p.m.) [344]

Tuesday, June 11, 1957—10:00 o'Clock A.M.

(Whereupon, the trial in the instant cause was resumed pursuant to adjournment, all parties being present as before, and the following proceedings were had:) [346]

* * *

Mr. Carey: Would it be of any assistance to the Court and counsel if I read the motion exactly as I made it?

The Court: Yes, all right.

Mr. Carey: I had this transcribed by the court reporter who was here yesterday:

“Joint Council 28, the Teamsters, and Western Council of Teamsters, each separately, move to dismiss the action as to it for the following jurisdictional reasons:

“(1) Plaintiff invokes the jurisdiction of this United States Court relying exclusively on Section 301 of the Labor Management Act of 1947, commonly known as the Taft-Hartley law. The action is one to recover damages for alleged breach of contract dated December 19, 1955, a copy of which

is attached to the plaintiff's amended complaint as Exhibit A. Neither Joint Council 28 nor the Western Conference is a party to that [349] contract. Therefore, neither is within the grants of jurisdiction defined in Section 301 of the Labor-Management Act of 1947.

“(2) If it be assumed that the plaintiff's amended complaint states any cause of action against either Joint Council 28 or the Western Conference, which is not conceded, nevertheless the cause of action so stated is not one for violation of breach of contract but rather is one for inducing a breach of contract by the Teamsters Local 839, which is an action for tort not within the jurisdiction conferred on the United States District Court by Section 301 of the Labor-Management Act of 1947.”

Mr. DeGarmo: As I understand it, then, that is the motion as to which the Court has requested that I direct my attention at this time?

The Court: Yes.

Mr. DeGarmo: It is my conception, if your Honor please, that the determination of whether that motion is good or whether it is bad must be determined by the pleadings, since it is made upon the pleadings and based upon the fact that we in our complaint have alleged that we have prosecuted this action and do [350] prosecute it under Section 301 of the Taft-Hartley Act.

I do not wish to concede the motion. As far as these defendants are concerned, I am frank to

state to your Honor, however, that I do not believe that under the allegations of the complaint we have alleged a specific contract with the Joint Council or with the Western Conference. We have only alleged as to those two defendants that they acted in concert with the Teamsters Local and, in effect, authorized, after requested to do so, and participated in the strike itself, and I conceive that that type of action is, as Mr. Carey pointed out, possibly one in tort and not in contract, as inducing a breach or participating in a breach of contract.

Therefore, without conceding the motion, I submit the matter to the Court under the Section 301. It is a new act, it is one that has not been too greatly construed by the courts, and I don't find any case in which this precise point—well, yes, there is one case in which this precise point was raised—and in that case the court held that, since there was no contractual relationship shown, the parent organization, so to speak, could not be held liable.

The Court: Well, as I told Mr. Carey, I have read the cases that he cited last night and it seems to [351] be the holding in those cases, and I am in accord with the holding, that the section of the Taft-Hartley Act which gives a right of action against unincorporated labor union associations—it is Section 185 (a), I believe, of Title 29, U.S.C.A., gives right of action for breach of contract with a labor contract and, of course, a federal district court is a court of limited jurisdiction, has no jurisdiction that isn't expressly conferred by the Congress, expressly or by clear implication, and it seems to me here that

I can't conceive of how a party could be sued or would be liable for breach of contract without being a party to the contract. There must be a contractual relationship before there can be a breach of that relationship or of the contract, and since these parties here in whose behalf this motion is made are not parties to any contract upon which the plaintiff relies, it seems to me that the contract action or action for breach of contract could not lie against them and it would have to be something in the nature, I presume, of a tort action for inducing another to commit a breach or at least a conspiracy to bring about breach of the contract.

There isn't any conspiracy alleged here and no tort liability alleged that would give this Court jurisdiction. There would have to be diversity of citizenship, [352] of course, if it didn't come within the provisions of the Taft-Hartley Act, so that I think the motions should be granted as to these two defendants, the Western Conference of Teamsters and Joint Council—let's see, is that right?

Mr. Carey: Joint Council No. 28.

The Court: No. 28, yes, I see. [353]

* * *

LEE KNACK

a witness called by the plaintiff, having previously been sworn, resumed the stand and testified further as follows:

Mr. Carey: Were you through, Mr. Etter?

Mr. Etter: Yes, sir.

Cross-Examination

By Mr. Carey:

Q. Mr. Knack, you identified the original contract of November 25th, 1955, which has been in evidence as Plaintiff's Exhibit 1, that being the contract between your company, Morrison-Knudsen, and the Atomic Energy Commission. You recall that? A. Yes.

Q. Now, that is the actual date that the contract was executed?

A. That was the date that the contract was entered into.

Q. Yes. A. Yes. [354]

Q. That is another way of saying the same thing, I guess. How long prior to that date was it that Morrison-Knudsen bid on the work, if you know?

A. I couldn't give you the exact date, sir.

Q. Would it be some considerable length of time?

A. Well, any date, any time that I might give would be strictly an estimate of time.

Q. Well, give us your best estimate, realizing that it is an estimate only.

A. Well, usually the contracts are awarded somewhere approximately thirty days after bid. That can

(Testimony of Lee Knack.)

vary considerably, however, and I don't recall the circumstances surrounding this one.

Q. Well, you have three stages, do you not? They call for bids and you make your bid, then some time elapses and the bid is accepted from one or the other of the several bidders?

A. That's right.

Q. Yes. Then the bidder who is low bidder, if it is low bidder, or who is awarded the contract, he knows at once that he is to be the contractor?

A. Not necessarily, sir.

Q. Well, isn't that ordinarily true?

A. No, sir. In bidding government work, and there are various government agencies and it varies within [355] government agencies——

Q. Yes.

A. ——so that quite frequently it is conceivable that you may have a bid in which you may be low bidder, but you may be so far out of the realm of the estimate, government estimate, that you may not be awarded the contract.

Q. Oh, I realize that, but that wasn't the point of my question. Whether you are low or not, you won't get it unless you are a qualified bidder; that is certain, isn't it?

A. I would say that was fairly true, yes.

Q. But after you have actually been awarded the contract, you soon learn that you are the preferred builder on that particular job?

A. Customarily, you receive a formal notice to proceed, yes.

(Testimony of Lee Knack.)

Q. Yes. Then the execution of the contract follows sometime later?

A. Well, that not being in my particular province within the company's operations, sir, I can't tell you just exactly the order of procedure there.

Q. So in this particular instance, you wouldn't be able to state what length of time elapsed from the time Morrison-Knudsen learned that it was accepted as the contractor up to the date of the execution of a formal contract? [356]

A. No, sir, I couldn't.

Q. Could you make any estimate at all?

A. Again, I could only make an assumptive estimate on the basis they would be somewhere within a thirty day period.

Q. I guess the best answer is, then, you don't know, is that it?

A. I would say that, yes, sir.

Q. However that may be, the formal contract was executed on this date of November 25th, 1955?

A. Yes, sir, it was so dated.

Q. You know that? A. Yes, sir.

Q. How soon after the execution of the contract on that date did you start to perform work?

A. That again, sir, is something that I wouldn't have explicit knowledge of, of the actual date that we began to perform work. There is a matter as to what is the conception of "work," because initially you begin to open an office, you might employ certain office personnel before you employ mechanics and laborers under the contract, and because I do

(Testimony of Lee Knack.)

not get into the picture insofar as the start of the jobs are concerned or when the personnel are employed. I cannot answer the question for you. [357]

Q. Well, you do know this, do you not, as one of the force of Morrison-Knudsen, that the first essential to performing a contract such as this was is to get the men to do the work, isn't it?

A. Yes, sir.

Q. Yes. That is the first thing you start out with is to recruit a crew? A. Yes, sir.

Q. The original complaint in this case and the amended complaint both state that the work under the contract dated November 25th, 1955, was started along about November 28th, 1955. You wouldn't be in a position to dispute the accuracy of that statement, would you?

A. I would neither be in a position to dispute it or to verify it.

Q. Assuming now that that estimate is correct, that was some 35 days prior to the effective date of the contracts upon which this suit is being brought, wasn't it?

A. Assuming that to be so, that would be the time element, would be correct.

Q. Yes. Some work was being done of some kind or character between, say, November 28th and January 1st, 1956?

A. I think that would be somewhat true, yes, within limitations of beyond my knowledge. [358]

Q. Can you tell us where you were during that period?

(Testimony of Lee Knack.)

A. In that period, I can to some degree. Let's see, in the period from December, approximately, 16th through to perhaps the 23rd or 24th of December, I was in Boise, Idaho, because that is the time of our board meetings and I am there at that time.

Q. Well, you were back and forth, weren't you, to Pasco during that period? A. No, sir.

Q. Who, on behalf of Morrison-Knudsen, took the initiative in recruiting the work crews for this job?

A. That would be the administrative force on the job itself, sir.

Q. Well, what individual, if you know?

A. The project manager was Ray Reed.

Q. Is he here? A. Yes, sir, he is.

Q. So he ought to be able to tell us something about that? A. Yes, sir, I would think so.

Q. Now, in answering some questions of Mr. DeGarmo and again with Mr. Etter yesterday, you made some reference to some meeting which, as I understood, was at Pasco on January 5th, 1956?

A. That is correct.

Q. You mentioned as being present at that meeting Mr. [359] Rossman?

A. I spoke of two meetings, sir. I spoke of a morning meeting and an afternoon meeting.

Q. Yes, you are correct about that.

A. And insofar as Mr. Rossman's presence is concerned, I know for certain that he was at the

(Testimony of Lee Knack.)

morning meeting, and that was the reference that I had as to Mr. Rossman's attendance.

Q. Then you had intended when you made that answer to have it relate to the morning meeting rather than the afternnon meeting?

A. That is the certainty point——

Q. Yes. A. ——of my answer, yes.

Q. Anyway, Mr. Rossman was there?

A. At the morning meeting.

Q. At the morning meeting? A. Yes, sir.

Q. You also mentioned Mr. Hollingsworth?

A. I mentioned Mr. Hollingsworth, sir, as being present at a meeting that was held here in Spokane. I did not make reference to Mr. Hollingsworth being present at meetings either at the A.E.C. on January 5th or at the Pasco meeting of January 5th.

Q. Well, that is what I wanted to get clear. Let's confine [360] ourselves for the time being to the morning meeting at Pasco on January 5th, 1956.

A. Yes, sir.

Q. Now, according to your best recollection, who were there?

Mr. DeGarmo: Pardon me, Mr. Carey, you mentioned a morning meeting at Pasco. I don't recall that there was a morning meeting.

Q. (By Mr. Carey): Wasn't this meeting at Pasco?

A. This was at the A.E.C. offices in Richland.

Q. Oh, in Richland? A. Yes, sir.

Q. I am not very familiar with that geography

(Testimony of Lee Knack.)

over there. So that was at Richland, all right. Now, at that meeting, you were there?

A. Yes, sir, I was.

Q. You know that? A. I certainly was.

Q. Who else was there?

A. Well, that meeting, sir, was a meeting apparently of the Hanford Negotiating Committee and various representatives of various labor unions, and I can recollect some of the people that were there but not all of them.

Q. I can understand how that would be. Tell us, though, who were there that you remember. [361]

A. There was Mr. Reed and myself, Mr. Henry Thurston of the A.E.C. was present at that meeting. I am not certain whether Mr. Frank Bacon was or not. It seems to me that he was.

Q. Who is Mr. Bacon?

A. He is also of the A.E.C. Mr. McCaffree, Ken McCaffree was there.

Q. Now, he was, I think Executive Secretary of the Hanford Negotiating Committee?

A. I believe that was his title, yes. There were some contractor representatives there of Hanford Works operations; there was a gentleman there from the J. A. Jones Company whose name I do not remember; Mr. Rossman was present there, and there were other people present, sir, that I would be uncertain in my mind as to who they were, I mean to definitely recollect.

Q. Aside from Mr. Rossman, do you recall if

(Testimony of Lee Knack.)

there was any representative of the Engineers Local there?

A. Other than Mr. Rossman, I don't recall, sir.

Q. Are you able to recall whether or not any representative of the Teamsters Local 839 was there?

A. Specifically, sir, I don't recall, I mean who it may have been, but I do recall that there was Teamster representation in the room, but who it was I don't recall.

Q. Now, without going into too much detail, what was the [362] subject matter of the discussion there at that morning meeting?

A. Well, sir, I had been informed that a meeting was to be held between various craft representatives, union representatives, and the Hanford Negotiating Committee, and I had learned of that through Mr. Thurston of the Atomic Energy Commission the day previous at my arrival at Richland and we had been asked if we would sit in on the meeting and merely listen and observe as to what was transpiring currently between the Hanford Negotiating Committee and the unions or some of the unions with whom they dealt or had been dealing, I should say.

Q. You didn't refuse, of course?

A. No, I didn't refuse.

Q. As a matter of fact, you were vitally interested because just thirty days or so before, forty days, you had entered in this contract for the performance of some work in the Hanford area?

(Testimony of Lee Knack.)

A. That is correct.

Q. And that is why you were interested?

A. Well, certainly I was interested, sir, from the standpoint that any time we have work to perform within a given area, the economic factors and circumstances in that area are of vital interest to us in the performance of that work. [363]

Q. Yes. Before you started to work on this contract of November 25th, 1955, were you already doing some work in the Hanford Area?

A. Prior to?

Q. Yes.

A. We had done work, as I understand it, prior to my time with the company, but in between the time that I had started with the company and to that date, we had not done work specifically in the Hanford Area.

Q. Then at the time you started to work on this contract when I say this contract, I mean the contract of November 25th, 1955—

A. Uh-huh.

Q. —you were not at that time doing any work, any other work, in the Hanford Area?

A. That is correct.

Q. That is what I wanted to bring out.

A. That is correct.

Q. Now, I suppose that this meeting was carried on in an orderly way, wasn't it?

A. Yes, sir.

Q. These meetings usually are, aren't they?

A. Invariably, sir.

(Testimony of Lee Knack.)

Q. All the representatives on both sides, or three sides, really a three-cornered affair, isn't it—the Atomic [364] Energy people, the contractors, and the labor unions?

A. It is your terminology, sir.

Q. All right. If you can invent any better, I would be glad to have the suggestion.

A. I couldn't invent any better.

Q. Okay. Now, wasn't the matter of major discussion there this question of isolation pay and bus transportation?

A. Well, I think, sir, that actually as an observer, I think it should be made clear that when I attended the meeting and as the meeting opened it was emphasized by both Mr. McCaffree and by myself that our presence in that meeting was one of observing, that we were not being represented by the Hanford Negotiating Committee, and the discussions which took place between the Hanford Negotiating Committee and the members of the unions that had been dealing with the Hanford Negotiating Committee. Now, that there was discussion concerning the bus transportation and the isolation pay, I can testify that there was, but that that was the predominant discussion, I cannot so testify.

Q. Anyway, as an observer, you were not only looking but you were also listening, weren't you?

A. Yes, sir.

Q. And you did hear this discussion about isolation pay and bus transportation? [365]

(Testimony of Lee Knack.)

A. I heard that as among some of the points that were discussed that morning, yes, sir.

Q. Yes. Well, we are only trying a lawsuit about that so we will try to confine ourselves to that subject.

Is that all you remember now about the morning meeting on the 5th?

A. No, sir, it is not all that I remember about it.

Q. Well, what else do you remember?

A. Well, I recall in relation to my presence there, and specifically the reason why I recollect Mr. Rossman's presence there, the question came up concerning the Morrison-Knudsen Company's status contract-wise on the job—when I say contract-wise, I mean in relation to the union associations by our agreements—and I remember specifically mentioning, directing the observation to Mr. Rossman, in that meeting that we, as Morrison-Knudsen Company, being a part of the AGC Heavy and Highway Agreement, that we considered that that agreement was applicable to that area because the area was so specified in the agreement, and directing it to Mr. Rossman.

Mr. Rossman said that that was a possibility that that was so, but rather than to make a commitment, he thought he'd better refer that particular problem to legal counsel. [366]

The Court: Pardon me, who is Mr. Rossman?

Mr. Carey: Mr. Art Rossman, this good looking gentleman behind Mr. Etter, representing the Engineers.

(Testimony of Lee Knack.)

The Court: He represents the Engineers? I just wanted to be sure about that.

Q. (By Mr. Carey): Did any conversation occur between you and Mr. Rossman at that meeting that you recall?

A. The conversation that I just recited, sir.

Q. You did have a conversation with Mr. Rossman?

A. Yes, sir.

Q. Do you recall whether or not at that meeting, and I am referring to the morning meeting on the 5th of January, Mr. Charlie Knapp was there?

A. Yes, I believe Mr. Knapp was there.

Q. So we can add his name to the roster?

A. As I say, I believe he was there, yes.

Q. Did you have any conversation with Mr. Knapp in connection with that morning meeting?

A. That morning meeting, no specific conversations with Mr. Knapp relating to the subject at all.

Q. Now, do you mean that you are positive that you did not have or merely that you don't remember of having any?

A. As any direct conversation with Mr. Knapp on the problem, as such, I don't recall having any at all as a direct conversation with Mr. Knapp. [367]

Q. You have known Mr. Rossman and Mr. Knapp for quite a number of years, haven't you?

A. I have been acquainted with Mr. Rossman since about 1952; I have been acquainted with Mr. Knapp approximately the same period of time. However, my contacts with Mr. Rossman have been very much more frequent than they have been with

(Testimony of Lee Knack.)

Mr. Knapp. In other words, I think I have seen Mr. Knapp ever since 1952 perhaps a half a dozen times, where I have seen Mr. Rossman with great frequency in that period of time.

Q. Well, whatever contacts you have had with Mr. Rossman and Mr. Knapp, I assume, have been for business reasons, haven't they?

A. Yes, sir.

Q. And you have found them honorable gentlemen?

A. Yes, sir.

Q. They wouldn't lie about you?

Mr. DeGarmo: Just a minute, if your Honor please. I object to that.

The Court: Yes, I think that is for the Court to determine, the credibility of the witnesses.

Mr. Carey: Very well.

Q. (By Mr. Carey): Well, now, that is all you remember about the morning meeting of January 5th at Richland? [368]

A. Again, you say "all," sir. You can remember snatches of things, of course. I do recollect that one part of the discussion, would seem to be a rather predominant part of the discussion, in that morning meeting occurred between the Hanford Negotiating Committee and some of the representatives in the room and I think it was in reference to the Pasco-Kennewick Building Trades Council representation in the meeting, as to which group did the Pasco-Kennewick Building Trades Council represent craft-wise of the various crafts in relation to the Hanford

(Testimony of Lee Knack.)

Negotiating Committee. I mean that seemed to have been an issue that, frankly, I am unable to give too many details on it simply because it seemed to have many past factors and associations back that were out of my scope of knowledge.

Q. Well, I guess we have about exhausted the morning meeting, let's come to the afternoon meeting. When was that held and where?

A. That was held in the Labor Temple in Pasco, I would say somewhere around 2 or 2:30 in the afternoon that the meeting commenced.

Q. Now, you were there at that meeting?

A. I was, sir.

Q. Again as an observer?

A. No, sir. [369]

Q. In what capacity were you there then?

A. That meeting, sir, had been requested of us and I received the notice of the request through our project manager, Mr. Ray Reed, sometime in the middle of December. He called me in Boise, Idaho, at my office, and informed me that the Pasco-Kennewick Building Trades representative, I believe a Mr. Bud Shure, had called him and asked if we would have what is known in the construction industry as a pre-job conference.

Q. Yes.

A. And it was that pre-job conference meeting that was being held in the afternoon.

Q. Now—— A. So——

Q. Pardon me. Now, this Pasco-Kennewick Building Trades Council—is that what you called it?

(Testimony of Lee Knack.)

A. I think that is the title of it, yes.

Q. That would include both the Engineers and the Teamsters?

A. I would be unable to say whether or not those organizations were affiliated with the Building Trades Council.

Q. Well, anyway, that specifically was a meeting that had been arranged for long prior to the morning meeting? A. Yes.

Q. The morning meeting developed rather spontaneously, [370] apparently?

A. Sir, let me say this, that the afternoon meeting, insofar as my participation in it was concerned, was one that had been arranged for sometime in mid-December. The events of the morning meeting and its arrangement, I would not know how long that had been arranged for, because it was merely because of my being present there for the afternoon meeting, and I had arrived the day before in Richland, let's say that my attendance in the morning meeting was one of happenstance——

Q. Yes. A. ——more than direction.

Q. But this afternoon meeting, which you call a pre-job conference, was a formal meeting arranged for after you knew you were going to do this work under this contract of November 25, 1955?

A. That is correct, yes.

The Court: Is that the meeting in Pasco on the afternoon of the 6th?

A. On the afternoon of the 5th, I believe, sir.

The Court: On the afternoon of the 5th?

(Testimony of Lee Knack.)

A. Yes, sir.

The Court: Oh, yes.

Q. (By Mr. Carey): Well, at that meeting, you were there, Mr. Reed was there—— [371]

A. Mr. Reed was there.

Q. ——and who else?

A. Mr. Bill Dunn was there of the Operating Engineers.

Q. Mr. Dunn? A. Yes, sir.

Q. Now, the Operating Engineers, I presume you mean the Local? A. Yes.

Q. Yes.

A. There was—I can recall there was a representative of the Sheet Metal Workers—I don't recall his name—there was a representative of the Asbestos Workers, there was a representative of the Electrical Workers, there was a representative of the Pipe Fitters, there was a representative of the Cement Finishers, and there were others in that particular meeting, sir. When we called the meeting together, as I recollect, there were some union representatives who were not in the meeting when it proceeded. There were some who came during the meeting while it was in progress, and there were some that left while it was in progress, who were there at the onset, so it is rather confusing to recall and recollect everyone who was there.

Q. I appreciate that. But isn't this statement generally true, that at that prearranged pre-job meeting at some [372] time or other during the course of the deliberations, there were representa-

(Testimony of Lee Knack.)

tives there of all the Locals that you anticipated you would be calling on to supply workmen?

A. As best as the circumstances to our knowledge at the time, yes, I think that is so, and I think there were also representatives of other Locals whose services we would not be requiring who were present.

Q. Well, was Mr. Rossman present at that meeting?

A. To the best of my knowledge, I cannot recollect whether Mr. Rossman was present at the meeting or not, sir.

Q. But if Mr. Rossman says he was, you wouldn't deny it, would you?

A. I certainly would have no reason to.

Q. Do you recall whether Mr. Knapp was present at that meeting?

A. I recall that Mr. Knapp was in the meeting. As to the length of time of his presence in the meeting, I am unable to say whether he was there for the full time or not.

Q. But you do recall definitely that he was there? A. Yes.

Q. At some time or other? A. Yes.

Q. But how long he remained—— [373]

A. I don't recall.

Q. You don't know whether he came in early or left early, you wouldn't undertake to say that?

A. There were other circumstances which lead to my confusion, because other representatives stopped and talked to me about other situations

(Testimony of Lee Knack.)

before we left the building in relation to other work that Morrison-Knudsen Company had in other areas in which they were affected, and there was much more discussion there that day other than related subjects.

Q. By the way, about how long did this meeting last?

A. Well, the meeting itself, as I recall, I was at the building itself somewhere, as I say, around from 2 to 2:30 until possibly after 5. How long after 5 I don't recall, because I knew that I had a scheduled plane out and I did stay long enough that I just had time to return to Richland to pick up my bag and get to the airport.

Q. Now, do you recall, Mr. Knack, that any representatives of Local Teamsters 839 were there?

A. Specifically, sir, I cannot say that there were representatives of Teamsters Local 839 present.

Q. I have been told there were quite a number there. Would you undertake to say that was not true?

A. I couldn't say that it was untrue or—— [374]

The Court: I think the Court should make a few remarks here in the interest of perhaps expediting this trial.

Of course, I will be obliged to take as much time as is necessary to try it, but the way it is starting out here, well into the second day without finishing one witness, it is beginning to become apparent that it is going to knock off a lot of other cases from the

(Testimony of Lee Knack.)

calendar that have been set for trial here in Spokane and that the counsel are ready to try.

Now, I can't tell, of course, from this protracted cross-examination what you are driving at, but it looks to me as if you are going right ahead without missing a beat and laying the foundation for proof in support of the affirmative defense which the Court has stricken from your pleadings. It looks to me as though the only purpose of this would be to show that the parties didn't actually intend that this contract negotiated through the Association here in Spokane, Associated General Contractors, should apply to this job.

At any rate, I think the Court is entitled to know just what you are pointing at here. I think I have a right to know what your contention is now. In view of the state of the pleadings, counsel is entitled to know. [375]

Mr. Carey: Yes; that's right.

The Court: Do you claim that the plaintiff was operating with these unions down there on this job on an oral contract that was negotiated at these meetings, or operating without any contract or under the Area contract?

Mr. Carey: This particular part of my examination is directed to the very matter that Mr. Etter called——

The Court: I wasn't too clear on what Mr. Etter was driving at either.

Mr. Carey: Maybe if you would get clear with Mr. Etter, you would understand me.

(Testimony of Lee Knack.)

The Court: Well, I just would like to know because I think I am entitled to know and counsel is entitled to know.

Mr. Carey: Well, Mr. Etter pointed out yesterday—well, let me start over again.

We put in the record these four sets of demands and answers, and by the agreement of everybody they stand the same as pleadings. Among other things in there is this letter from Mr. McCaffree dated——

The Court: Well, I don't care what you have got in your requests and your answers, that isn't binding on the Court if they are off the track and not [376] material here to any issue in the case, and I can disregard them and I am not obliged to sit here and listen to testimony day after day regarding something that isn't material.

Now, you must have a defense. What is your defense? Since I have stricken your attempt to vary the terms of the written contract by oral testimony, what is your defense that all this is based on? Can't you tell me in plain English?

Mr. Carey: It is just what Mr. Etter undertook to present yesterday.

The Court: Well, perhaps Mr. Etter can tell me, somebody tell me. What is all this directed to, day after day?

Mr. Etter: I say the contract that they are suing on was not in effect and they were not acting under it, and, as a matter of fact, although they were signatories to what you call the A.G.C. contract,

(Testimony of Lee Knack.)

there wasn't anybody acting in accord with it, as a matter of fact, and whether or not they could enforce a right is something I don't know, but the question that I am concerned with, first, is whether or not if people voluntarily say, "We are going to work under this particular agreement," whether they can then claim breach of another [377] agreement.

Now, that isn't varying the terms of it.

The Court: Is it your contention, then, that they were acting or operating under the Area contract?

Mr. Etter: Absolutely. As a matter of fact, one of these admissions, this one statement of McCaffrey's, the letter terminated, the answer to that admitted, subject to the qualification, that between December 31, 1955, and the date of the work stoppage referred to in the plaintiff's complaint and amended complaint, negotiations were carried on and were being carried on between the committee representing the contractors for new contracts covering construction work to be performed exclusively in the Area.

Mr. DeGarmo: I point out that this is their answer, that is not our answer.

Mr. Etter: That is very true, that may not be his answer, but his Honor is asking me on what theory we have got to argue with you whether or not we have breached a contract.

Now, if you people are parties to an agreement where you are waiving the enforcement of your agreement, even though you say it covers Benton

(Testimony of Lee Knack.)

County, if you are waiving the enforcement of it, I can't see why we haven't a right to show that, if we are led into this situation over there because they all agree on extending it and [378] they all agree that the Contract is effective, and then come back and say we have breached some other contract, even admitting that we signed it.

The Court: Well, my point is at this stage of the trial, if you are shifting your position and relying upon waiver of the contract which was negotiated up here in Spokane, the Associated General Contractors, or you are relying on something in the nature of estoppel, that you were misled to your detriment by the conduct of these people, then Mr. DeGarmo is entitled to know it, I should think, because it isn't in the pleadings.

Mr. DeGarmo: That's right.

The Court: It isn't set out in any issue that I can see here.

Mr. DeGarmo: That's right, and I object to it.

Mr. Etter: Well, your Honor——

The Court: Of course, I want to try the lawsuit on the evidence.

Mr. Etter: Facts.

The Court: As long as it is within the proper channels, and not to the pleadings, but I think that we ought to have a definite understanding of where we are going here at this stage of the game.

Mr. Etter: Well, your Honor, let me make this statement: Your Honor refers to estoppel and [379] these different things. If that is what the doctrine

(Testimony of Lee Knack.)

is that permits this showing, that is fine and dandy, but I am frank to confess I don't know for this reason, that you asked the other day about mutual mistake.

Now, our position was in the beginning that there couldn't have been any mutual mistake. When people were doing something and they both understood exactly what they were doing, I can't see where we can claim mutual mistake. I can't say at the time that we carried on these negotiations at Hanford and carried them on with A.G.C., that there was fraud in A.G.C.'s minds or fraud in our minds or fraud in Morrison-Knudsen's, so we can't say at that time because nobody certainly thought there was any fraud. Now I can come in, I suppose, and charge that they have committed a fraud by bringing this action, but that is not part of this action, so I can't truthfully say mutual mistake, I can't truthfully say fraud.

We can show this course of conduct that shows, as a matter of fact, that we didn't breach that contract. We can show what happened down there. Now, if that constitutes estoppel, all right, and that certainly is a plea of ours, and if it constitutes any of these other defenses, but I say we are in a peculiar position, your Honor, as a result of a situation down there not of [380] our choosing that started back in 1946 and of these negotiating committees and of contracts that have been written precisely like this one is, has been sued upon, that haven't been effectively interposed down there.

(Testimony of Lee Knack.)

As an example to show the position that we are in here, I tried a contract the other day, your Honor, which is the agreement of the Associated General Contractors with every one of the unions, including the two defendants, extending from 1950 to 1955, for five years, in which in that contract it refers descriptively to the very same thing that your Honor said barred us from this testimony. It says Benton County, Benton County, Benton County, and yet, so your Honor will understand my position, there is a contract which has been in force on the Hanford Project which refers to the precise specifications that they have in their contract; in other words, refers to the exact thing in their contract about the Hanford agreement in which it refers to this exhibit of the territory covered and which they set out this area, including that portion of Benton County.

Now, that is the position that we are in. Here is a contract that covers that small portion of Benton County that is involved in this lawsuit that has been in force and effect for five years and [381] continued each year for every contractor that ever does any work down there.

Mr. DeGarmo: Is that contract in evidence?

Mr. Etter: No; it is not, but I am trying to explain what the position is. The Court can disregard what I have to say if he wishes, but, nevertheless, I am saying we are placed in this position where we have one contract here and another contract, and your Honor has ruled on the basis of the words,

(Testimony of Lee Knack.)

"Benton County," that nobody could be mistaken about Benton County, and yet the 1950-1955 contract of the A.G.C. says Benton County just the same, and neither Mr. Guess nor anybody will ever claim they had any contract or jurisdiction that covered this county, on a contract that has been in existence for five years in the same language prior to the time they executed this one.

That is the purpose of trying to show that there was never a breach of this contract.

Mr. Carey: I notice, your Honor, that that half hour's cross-examination of mine has already extended to a full hour.

The Court: Well, we used to say in the Army that is S.O.P., standard operating procedure. I am not surprised at that.

Mr. Carey: Yes. [382]

The Court: Mr. DeGarmo.

Mr. DeGarmo: I think, if your Honor pleases——

Mr. Carey: Just a moment, Mr. DeGarmo. My memory may be at fault in this, sometimes is, but as I recall, Mr. DeGarmo on his direct examination inquired of the witness on the stand about these very meetings on January 5th.

Mr. DeGarmo: No, no; you are wrong, Mr. Carey. I never mentioned a meeting on January 5th. That was brought out on cross-examination.

Mr. Carey: Well, I say——

The Court: All right.

Mr. Carey: Anyway, I infer that your Honor——

The Court: Well, if you have in mind proving

(Testimony of Lee Knack.)

that the plaintiff didn't operate under this contract on which they rely, why, of course, if you can show that or if you can bring out in any way that you didn't breach the contract, that is a matter of general denial.

Mr. Carey: I think I understand.

The Court: But the Court still adheres to its ruling that this contract is not ambiguous and that it may not be varied by parol evidence.

Mr. Carey: Well, I can bring it to a conclusion.

The Court: It is time for recess now. Court will recess for ten minutes. [383]

(Short recess.)

The Court: All right, proceed.

Mr. Carey: Your Honor, I want to ask another question or two and then I will make an offer of proof.

The Court: Yes; all right.

Q. (By Mr. Carey): Mr. Knack, you recall that the Teamsters' contract now in suit, Exhibit 2, was executed December 19, 1955, effective January 1st, 1956?

A. That's right.

Q. Now, before the effective date of that contract with the Teamsters, this Morrison-Knudsen work was already in progress?

A. Yes; that is correct.

Q. Starting, according to the complaint, about November 28th and continuing up until December 31st?

A. Yes.

Q. That is about 30 days it was in operation?

(Testimony of Lee Knack.)

A. As to what degree of operation, sir, I am unable to say.

Q. Some operation? A. Yes.

Q. What contract were you operating under during that 30 days?

A. Well, we were operating, sir, in that period under the provisions of our contract with the A.E.C. which [384] specified under what conditions we were to work under.

Mr. Carey: I now offer to prove, your Honor, by Mr. Knack, the witness on the stand, that this meeting which we have called the afternoon meeting, at which he was present, Mr. Reed, representing Morrison-Knudsen, was present, Mr. Rossman, Mr. Knapp, and a number of other persons representing different locals, Mr. Knapp asked Mr. Knack, the witness on the stand, the direct question concerning what the policy of Morrison-Knudsen was with respect to paying isolation pay and furnishing transportation during the continuance of the job then in progress; that Mr. Knack said, in substance, that they had bid the job upon the assumption that isolation pay and bus transportation would be furnished and that it was their intention to continue operation under that understanding of the Hanford contract.

The Court: It is rather unusual, in my experience at any rate, to——

Mr. Carey: Pardon?

The Court: I say, it is rather unusual, in my experience, for counsel to make an offer of proof

(Testimony of Lee Knack.)

of what a witness on cross-examination will testify. I don't know if Mr. DeGarmo is willing to concede that he will so testify. [385]

Mr. DeGarmo: I certainly am not.

The Court: Otherwise, I think you'd better continue with the examination of the witness, because if you make the offer of proof and he isn't going to testify to that, this is just cross-examination, this isn't your case yet.

Mr. Carey: I understand.

The Court: You see? So I think you'd better proceed with the cross-examination, if that is what you want to ask him.

Mr. Carey: Well, the reason I made the offer of proof, was your Honor already indicated you didn't care to have the cross-examination proceed along that line any further.

The Court: No; I didn't intend to so indicate. I wanted to find out what it was leading to and what it pertained to, I wanted to know what your defense was, and if you are trying to develop here that the company didn't operate under this contract at all in the work in the Hanford Area and that you didn't breach it, why, anything that is material to those issues, you can proceed.

Mr. Carey: Well, that is what we want to bring out.

The Court: All right, go ahead. Mr. [386] DeGarmo?

Mr. DeGarmo: I don't wish to take issue with the Court's statement, since I don't regard it as

(Testimony of Lee Knack.)

an official ruling. I don't want the record to lose sight of my objection, that any attempt on the part of these defendants to show reliance upon an oral contract or upon a waiver, both of which must be pleaded, they are affirmative defenses and they have not so pleaded them, and, therefore, any attempt to offer such evidence, I wish my objection to show.

The Court: Well, yes, the record may show your continuing objection, Mr. DeGarmo. All right, go ahead.

Q. (By Mr. Carey): I will ask you the direct question, then, Mr. Knack, if at the meeting we have last been discussing, the afternoon meeting on the 5th, if it is not a fact that Mr. Charlie Knapp asked you the direct question about what Morrison-Knudsen proposed to do in carrying on this work and whether or not you would continue to pay isolation pay, furnishing bus transportation, and you assured him that that is what would be done?

Mr. DeGarmo: Just a moment, Mr. Knack.

In order again to be triply sure, I wish my objection to show to that specific question, the objection I just stated, upon the grounds it is an attempt by these defendants to show an oral contract. [387]

The Court: Very well.

Mr. DeGarmo: Which has not been pleaded.

The Court: The objection is overruled.

Q. (By Mr. Carey): Will you answer the question, please?

A. Well, the question has many facets to it——

(Testimony of Lee Knack.)

Q. Pardon?

A. The question has many facets to it, sir, and in order to answer the question properly, the question was put to me whether it was Mr. Knapp or not. I don't recall, but the question was put to me as to what our position was in relation to the payment of isolation pay and the continuing transportation as the matter stood at that moment. In other words, there was no question asked of me as to how we were going to operate through to the completion of our work on that project, and because of my contact with the morning session as an observer, in which it was indicative of the fact that these people who had been negotiating previously and were still discussing matters between themselves, that they were endeavoring to arrive at some sort of a solution to their problems, and that on that basis, that we of the Morrison-Knudsen Company were not going to be the people who were going to discontinue that practice; in view of the fact that other contractors there were continuing the practice, were still paying [388] the pay, that it was unrealistic to believe that we could do so and employ people under those competitive conditions.

Q. You did, then, have a conversation with Mr. Knapp on that occasion concerning the subject matter of my question?

The Court: He says he doesn't recall whether it was Mr. Knapp.

Mr. Carey: Pardon?

The Court: He said he doesn't recall whether

(Testimony of Lee Knack.)

it was Mr. Knapp or not; he had a conversation with someone there.

A. It was a conversation, to the best of my recollection, which occurred as part of the meeting.

Q. (By Mr. Carey): Yes. It could have been Mr. Knapp? A. It could have been, yes.

Q. It could have been Mr. Rossman?

A. I don't recall Mr. Rossman at all making any conversation of that light in the afternoon meeting.

Q. Would you be able to state, Mr. Knack, how many Teamsters were actually employed on this job at the time and immediately before the time the strike started on March 22nd?

A. No, sir; I would not be able to state.

Q. And would you know whether many or [389] few?

A. I wouldn't have any idea as to the number, sir.

The Court: I'm sorry, I didn't get that last question and answer. What did you ask him, Mr. Carey?

Mr. Carey: I asked him if he had any idea how many Teamsters were employed, whether many or few, and he said he didn't know.

The Court: Thanks. Prior to January 1st, you mean?

Mr. Carey: No.

Mr. DeGarmo: Prior to the strike.

The Court: Prior to the strike.

Mr. Carey: Prior to the beginning of the strike on March 22nd. The strike started on March 22nd.

(Testimony of Lee Knack.)

The Court: The one thing that occurs to me, while I think of it here, Mr. Knack—I don't know whether you can answer my question or not—but you have testified here, as I understand it, that at least there was some activity, some beginning of the performance of this contract that you had, construction contract with the Atomic Energy Commission, about the latter part of November, the 28th of November, or something like that——

A. Yes, sir.

The Court: ——and your contract that you had negotiated here through the Associated [390] General Contractors didn't become effective until the 1st of January, 1956, is that right?

A. The current agreement, that is correct.

The Court: Yes, that is the agreement in suit here. Could you tell me how many members of these defendant unions that Morrison-Knudsen employed before the 1st of January, 1956?

A. On the Hanford Project?

The Court: On this particular job.

A. I'm sorry, sir, I couldn't, no, sir.

Q. (By Mr. Carey): One more very short subject and I will be through. Are you familiar with a letter dated April 27, 1956, written by your attorneys, Allen, DeGarmo and Leedy, and signed by Mr. DeGarmo, addressed to the International Brotherhood of Chauffeurs, Warehousemen, and Helpers, Labor Temple, Pasco, and International Union of Operating Engineers, Local 370, 325 South

(Testimony of Lee Knack.)

Brown Street, Spokane 4, Washington, concerning this controversy?

A. I couldn't say as to any familiarity with that particular letter, sir, unless I were to see it.

Q. I will show you a copy of it attached to the original complaint.

A. Yes; I am familiar with the letter.

Q. How long have you been familiar with it? [391]

A. I would say at the approximate time that it was sent out.

Q. Were you consulted about the writing of it?

A. Yes.

Q. The strike had been in progress then from March 22nd to the date of the letter, or substantially 35 days? March 22nd to April 25th, approximately 30 days? A. Could be.

Q. Yes. Isn't it a fact that as of the date of that letter was the first time that you ever notified any of these unions that you claimed that the two contracts in suit now applied to the Hanford Works?

A. No.

Q. When did you notify them formerly, prior to April 27th?

A. There were contacts and conversations and meetings, which I did not attend, which were under the auspices of our bargaining agent in which our bargaining representative, the Associated General Contractors, were engaged, and as to the dates and the times of those, since I was not present, I don't know when they actually occurred, but in conversa-

(Testimony of Lee Knack.)

tions that I had and telephone conversations, and so forth, there was assurance to me that that position had been made clear by our bargaining representative, the Associated General [392] Contractors.

Q. Well, then, if you were not present, all you know about it is hearsay, isn't it?

A. I know that which was reported to me, sir.

Q. Well, who reported it?

A. The project manager, Mr. Ray Reed, Mr. Sam Guess, of the Associated General Contractors.

Q. They told you about it?

A. They told me of the contracts and progresses of meetings, and so forth, yes, sir.

Q. But so far as you personally are concerned, the letter to which I have called your attention is the first formal written notice that you know of where anybody on behalf of Morrison-Knudsen notified representatives of the unions that these contracts applied to the Hanford Area?

A. Insofar as written notice, it seems to me that there was a prior written letter, and I am not certain about that since I didn't write it.

Q. Well, if you didn't write it, that would be hearsay, wouldn't it? A. That's right.

Mr. Carey: That is all, your Honor.

The Witness: I suppose.

The Court: Mr. DeGarmo. [393]

(Testimony of Lee Knack.)

Redirect Examination

By Mr. DeGarmo:

Q. Mr. Knack, did Morrison-Knudsen Company ever become a signator of the Hanford Works Agreement, as such? A. No, sir.

Q. To your knowledge, was any member or employee of the Morrison-Knudsen Company organization ever a member of what was called the Hanford Contractors Negotiating Committee?

A. No, sir.

Q. Reference has been made here, Mr. Knack, to the question of transportation on cross-examination. The question of transportation, do you know what that refers to as related to the Hanford Project?

A. Insofar as what I know about it, Mr. DeGarmo, it is a condition which has existed prior to my acquaintanceship with conditions and circumstances at Hanford, and insofar as I can determine, it not having appeared in some—in any agreements that I am acquainted with, it appeared to be a practice factor, an established practice on the base or on the Hanford Works.

Q. Well, that is the question I want to ask you. To your knowledge, is there any provision in either the A.G.C. contract, as it existed, the January 1st, 1956, agreement, [394] the '56-'57 and '5 agreement, which is Exhibit 2, or the 1952-1954 A.G.C. agreement, which I think is Exhibit 4, or in the Hanford

(Testimony of Lee Knack.)

Works Agreement, which is not yet an exhibit in this case, providing for transportation? As you have stated, you understood it to be as a custom?

A. I know of no provision in either agreement, specific provision.

Q. Mr. Knack, on what occasions were you actually present in either Richland, Pasco, or Spokane from January 1st of 1956 to March 22nd of 1956, other than this occasion that you have mentioned on cross-examination of January 5th, 1956?

A. I arrived in Richland on the 4th of January, late afternoon, in order to be available for the afternoon meeting which I had come to Richland to attend in Pasco. In relation to any other meetings in Spokane, there was another meeting which I attended here in Spokane, the exact date I don't recall, it was in the forepart of 1956, in which we discussed the situation in relation to the project agreement at Chief Joseph Dam, and in that particular meeting—and that meeting was held at the A.G.C. offices—in that particular meeting, there was some discussion, reference made, I should say, to the question of the Hanford Project Agreement in relation to our talk over the union's position that the [395] agreement that they had negotiated with the A.G.C. excluding project agreements meant that they did not wish to waiver from that agreement in relation to our request to have the Chief Joseph Project agreement continued through to the completion of the work; that since the A.G.C. agree-

(Testimony of Lee Knack.)

ment contained a provision of no more project agreements, that they would not concede to my request to permit the project agreement at Chief Joseph to continue.

Q. I think you have already testified to that. What I want to find out, on what occasions were you personally present at either Pasco, Richland, or Spokane between January 1st and March 22nd, when the strike occurred, other than on the 5th of June occasion or June 4th or 5th?

A. January.

Q. Or January 4th and 5th, and the occasion which you mentioned relative to Chief Joseph?

A. No other times.

Q. Just those two occasions?

A. Yes, sir.

Q. All right. Who, on behalf of Morrison-Knudsen Company, was conducting negotiations with the unions, and by unions, I am referring to the defendant unions in this case, concerning the application of the agreement, the area agreement—I am referring to Exhibits 2 and 3— [396] to the Hanford Works Area between January 1st and the March 22nd date?

A. The Associated General Contractors, Heavy and Highway Chapter, Spokane.

Q. Did you personally at any time during that period negotiate directly with any representative of either the Teamsters or the Operating Engineers except on these two occasions that you have men-

(Testimony of Lee Knack.)

tioned, the January 5th and the Chief Joseph Dam, relative to Hanford Works?

A. I think in answering your question, Mr. DeGarmo, that you mentioned negotiations. In neither case were those negotiations, and in answer to the rest of your question, that no other times was I in contact with representatives of either the Operating Engineers or the Teamsters in relation to this matter in any fashion that might be called negotiations at all or in any fashion, as a matter of fact.

Mr. DeGarmo: I have no further questions at this time.

Recross-Examination

By Mr. Etter:

Q. Do I understand, Mr. Knack, that Morrison-Knudsen never did sign any bargaining agreement relating to the Hanford Works? [397]

A. That is correct, sir. The question was asked of me in relation to the Hanford Negotiating Committee.

Q. Well, the Hanford Negotiating——

Mr. DeGarmo: I think the question I asked was the Hanford Works Agreement, which is quite a different thing.

Q. (By Mr. Etter): What is the Hanford Works Agreement?

A. Well, it is the agreement that was in existence up until December 31, 1955.

Q. Well, isn't the continuing agreement, year to year, in the area where the Hanford Works is

(Testimony of Lee Knack.)

located, isn't that what they mean by the Hanford Agreement? A. Not necessarily, sir.

Q. Beg your pardon? A. Not necessarily.

Q. Well, then, what is your understanding of it?

A. Well, a labor agreement, as such, to be a labor agreement, must be negotiated and conformed to the terms of its negotiated principles.

Q. Yes. Were you present at a meeting somewhere in 1952 with some 200 or more contractors, unions, and the head of the project, one Mr. Shaw of the A.E.C.?

A. I was present in early 1952, somewhere around perhaps March, I think. I am not certain of that time. The numbers of people involved were not 200. There was [398] some contractors, the A.E.C. personnel, and some unions were present at some of the meetings, which extended over a period of two, three, four days, possibly.

Q. Do you remember, Mr. Shaw?

A. Yes; I do.

Q. What was his particular position at that time?

A. I'm not certain as to what it was. I understand he was the operating manager of the A.E.C. installation.

Q. Of the A.E.C. installation?

A. At Hanford.

Q. Now, can you tell me whether at that time Mr. Shaw advised that there were appropriations for further work in that area of about one hundred thirty million dollars?

(Testimony of Lee Knack.)

A. I don't recall that, sir, no.

Q. Well, what was this meeting about? Maybe you and I are talking about different meetings.

Mr. DeGarmo: Well, if your Honor please, it seems to me that I wish to object at this time to these questions upon the ground that they are not proper redirect, they are not aimed at any question which was brought out, or they are not proper recross, rather. They were not aimed at any question which was brought out on redirect. The question I asked was whether they had become a signator to the Hanford Works Agreement and [399] that, I think, is a very pointed question.

The Court: I think counsel has a right to inquire regarding that agreement.

Mr. Etter: Whether it required a signature, I wanted to point out, to become a signator.

The Court: Well, all right, go ahead. Overruled.

Mr. DeGarmo: I think there is only one way you can sign and that is to sign. I don't know of any other way.

The Court: Well, the objection will be overruled.

Q. (By Mr. Etter): Was there discussed at this meeting the future relationships of the contractors and the unions in construction work at the Hanford Project?

A. As part of the discussion, yes, it was an investigation or exploratory effort——

Q. That's right.

A. ——on the part of the A.E.C. to attempt to

(Testimony of Lee Knack.)

work out an arrangement in the nature of a project agreement or a Hanford Works Agreement, whatever it may be called.

Q. And wasn't that because Mr. Shaw stated—maybe I have the amount wrong—that they were going to commence a considerable amount of construction in there and they wanted stable labor relationships? [400]

A. The best of my recollection, sir, the meetings in which I was present involving the question of future labor relations were meetings where most of the discussion was directed by Mr. Oscar Smith, rather than Mr. Shaw.

Q. Well, is he an A.E.C. man, too?

A. Well, Mr. Smith is the—I suppose the general labor relations head or personnel head of all A.E.C. installations out of Washington, D. C.

Q. That's right, and wasn't it said at that meeting by either him or by Mr. Shaw that he wanted the unions who were going to be working there, the workmen, and the employers present, prospective or future, who were going to have work there, to undertake to reach some agreement that they could all live with? Wasn't that said?

A. There were several meetings there.

Q. Well, was that said at any of them?

A. Yes, there was a meeting in which just the contractors and A.E.C. personnel were present. Actually, the circumstance of that series of meetings was predicated on the request of the A.E.C. directly to Mr. Harry W. Morrison, our company

(Testimony of Lee Knack.)

president, to send over to Hanford a labor relations representative of the company—we had no work engaged at all—to attempt to study and [401] analyze an idea that the A.E.C. had.

Q. Of course, you had had work back there in 1948, '49, isn't that correct?

A. That is correct. I say it is correct; it is only correct insofar as my not having been with the company is information.

Q. Having these contracts, you know that your people, Morrison-Knudsen, were in there doing work back in '48 and '49?

A. I know they were doing work, sir, but the dates I don't know.

Q. And so isn't it a fact that either Mr. Smith or Mr. Shaw or one of the A.E.C. men in attendance said before they embarked on this big construction program, "One of the purposes of this meeting is for you people all to get together and determine some formula that you can live together with during this construction to avoid a lot of strikes and labor disputes." Didn't he say that?

A. Well, actually, sir, the thing that he pointed out at the beginning was that it was—as I recall, he was talking about an exploratory or trying to set up a sample type of approach in which they were going to use the Hanford Works Area as a beginning approach to such a program and hope that if it were successful there, [402] it would be used at Oak Ridge, it would be used at Arco, it would be used at other Atomic Energy installations. In other

(Testimony of Lee Knack.)

words, they were going to attempt to establish a pattern, not in relation to Hanford alone, but as a program, over-all A.E.C. program.

Q. Now, isn't it a further fact that he suggested at that time that the unions work out their particular problems and that the employers or the contractors select certain of their people to negotiate agreements that would apply to the Hanford Works?

A. The initial stages, as I recall——

Q. Well, I would like to have you answer that first, if that was mentioned. Then you may explain it, if you wish, Mr. Knack, but would you answer that?

A. Will you ask the question again, please?

Q. Yes. Did Mr. Shaw suggest that the employers set up a committee representing employers for labor relations and that the unions do the same thing so that they could, as representatives of the workers and the contractors on the job, negotiate agreements that would create a stable relationship?

A. He suggested first that a committee be set up of contractors to determine the opportunity or possibility of getting the unions together and subsequently from such an organization would be established a negotiating [403] committee of contractors on the site who would then negotiate with the unions.

Q. Do you know a Mr. S. K. O'Connor?

A. I knew Mr. S. C. O'Connor.

Q. Who was Mr. O'Connor?

(Testimony of Lee Knack.)

A. He was an employee of the J. A. Jones Company, I believe.

Q. And they are still there, are they not? They are still doing work down there?

A. I should say that he was an employee of, I believe, the Atkinson-Jones combination.

Q. Well, wasn't it a fact that shortly after this meeting that Mr. O'Connor was appointed a chairman of a representative group of contractors?

A. Yes.

Q. Isn't that correct? A. Yes.

Q. Now, do you recall his signature?

A. Yes.

Q. Is that his signature (indicating)?

A. Yes.

Mr. Etter: Would you mark this, please, Mr. Taylor?

The Clerk: Defendants' 5.

The Court: What number is that? [404]

The Clerk: 5, your Honor.

The Court: All right.

Mr. DeGarmo: May I see it, counsel?

Mr. Etter: I haven't asked to have it admitted yet. I will show it to you in just a minute.

Mr. DeGarmo: It seems to me, if your Honor please, that I am entitled to know what the witness is being examined concerning.

Mr. Etter: I haven't identified it yet or examined him at all.

The Court: After he gets it identified, if he offers it, then you may see it, of course.

(Testimony of Lee Knack.)

Mr. Etter: Yes.

Q. You recognize the signature, you said. Now, would you, without disclosing anything, would you look at the context of the letter? A. Yes.

Q. Now, having examined it, does that refresh your recollection to any extent on one of the purposes of that meeting to which I have referred?

A. The purpose of the meeting to which you referred is as I stated it to be, sir. As I say, you are speaking of several meetings.

Q. Well, I will ask you this: Was a committee of employers organized at the request of the Atomic Energy Commission [405] to represent all of the employers in the Hanford Project?

A. A committee was first asked by the Atomic Energy Commission to be organized by the employers to pursue the possibility of getting a uniform agreement with all the crafts that were involved. There were two events in that situation, sir.

Q. All right, tell me what they were.

A. The two events, as I recollect them to be, one was to attempt to establish the possibility of arriving at a committee or arriving at a collective bargaining agreement, and once having got acquiescence and concerted agreement between the unions as to that possibility, then a negotiating committee to be established to actually get into the throes of the negotiations. Because the Atomic Energy Commission was very explicit to the contractors, and I am certain they were equally explicit in meetings with the unions, that they would not consider any

(Testimony of Lee Knack.)

approach to a project agreement unless all the unions who might be employed on the project would sign the agreement and sign a uniform agreement, and until that was adjudged to be possible and meetings were held for that purpose, then negotiations couldn't proceed, and it was the Atomic Energy Commission's position that they did not wish to have negotiations proceed, until the unions themselves had come in and [406] said that they were prepared to sign, all the unions involved were prepared to sign.

Q. Now, I would like to ask you this question: Was a Hanford Contractors Negotiating Committee organized at the request of the Atomic Energy Commission to represent all employers on construction work for the Commission on the Hanford Project in negotiations with craft union representatives? Now if you can answer that yes or no, would you please do so? A. Yes.

Q. Beg your pardon? A. Yes.

Q. It was? A. Yes.

Q. Now, that negotiating committee that was organized, do you know of your own knowledge that they negotiated with the craft unions?

A. Yes; they did.

Q. And that the craft unions negotiated with them? A. Yes.

Q. And that has been a practice every year since this committee was organized in 1952, has it not?

A. Insofar as subsequent years after the agreement, we had no interest over there, we were not

(Testimony of Lee Knack.)

performing work; therefore, I cannot say as to what the conditions and [407] circumstances were subsequently.

Q. Mr. Knack, didn't you know as labor relations representative when you were over there in 1955 when you were looking into this job, what the status of the Hanford Negotiating Committee was? Are you telling us you didn't know anything about it?

A. I knew at the time that the job was awarded that there was a Hanford contract and agreement, or Hanford Agreement, in existence. I knew that it was coming up for an expiration date. [408]

* * *

Mr. Etter: I don't think so.

The Court: Mr. Carey? Where has Mr. Carey gone? Well, Mr. DeGarmo.

Mr. DeGarmo: No; I have no further questions of this witness.

The Court: All right, the witness may step down, then.

I will have to recess until 2:00 o'clock today. I have a dental appointment at 1:00. Court will recess until 2:00 o'clock.

(Whereupon, the trial in the instant cause was recessed until 2:00 o'clock p.m., this date.)

2:00 o'Clock P.M., Tuesday, June 11, 1958

(Whereupon, the trial in the instant cause was resumed pursuant to the noon recess; all

parties being present as before, and the following proceedings were had:)

The Court: All right, proceed.

Mr. DeGarmo: Mr. Guess, will you come forward and be sworn, please? [410]

SAM C. GUESS

called and sworn as a witness on behalf of the plaintiff, was examined and testified as follows:

Direct Examination

By Mr. DeGarmo:

Q. Where is your place of residence, Mr. Guess?

A. Spokane, Washington.

Q. And, for the record, will you state your age?

A. 47.

Q. And what is your business or occupation?

A. I am the Executive Secretary of the Spokane Chapter of the Associated General Contractors, Incorporated.

Q. And for what period of time have you been such Executive Secretary?

A. Since January the 20th, 1954.

Q. Is the Chapter to which you have referred that which is known as the Heavy Highway and Engineering Chapter? A. It is, sir.

Q. Before we go into the details of this case, Mr. Guess, will you give us some of your background? You were born where?

A. I was born in Greenwood, Mississippi.

Q. And what formal education do you have?

(Testimony of Sam C. Guess.)

A. I was educated at the University of Mississippi and I [411] graduated in 1931 with a degree of Bachelor of Science in Civil Engineering.

Q. And following your graduation from the University of Mississippi, will you tell us in just a brief way what was the nature of your work between the time that you graduated and the period when you became the Executive Secretary of the Associated General Contractors, Spokane Chapter?

A. I was employed by the Corps of Engineers for a period of 22 years and ranged in duties and assignments from work on the lower Mississippi to flood control work on the Columbia River, and then at the inception of the war I went into the field of airport construction, and following that a period of service overseas with the Army and then back to the United States with the Corps of Engineers continuing in military construction during the Korean War.

Q. Is it fair, then, to say, Mr. Guess, that you have been engaged in the construction industry during the entire period since your graduation from the University? A. That is correct, sir.

Q. And will you state again when you became Executive Secretary of the A.G.C., Spokane Chapter? A. January, 1954.

Q. Will you state, Mr. Guess, as such Executive Secretary, [412] what is the nature of your duties?

A. One of the prime activities of the Associated General Contractors is in negotiation of wage agreements and the policing and business management

(Testimony of Sam C. Guess.)

relations that exist between the various labor organizations with whom we have contracts and the contractors, representing the contractors, listening to the complaints that the labor unions raise about them, about the contractors, and trying to work on the amicable relations between the two parties at all times.

Q. Well, in your representation and negotiations with the labor unions, do you represent any particular group of contractors?

A. I represent all of the members of the Spokane Chapter.

Q. Now, with reference to the Spokane Chapter, Mr. Guess, when was it originally formed?

A. The Chapter was granted for the Spokane Chapter to be organized in April of 1921.

Q. And as the chapter was originally constituted, what was the area of its jurisdiction?

A. The Pacific Coast was boundary on the west, the mouth of the Columbia to a half-way point between Spokane and St. Paul-Minneapolis, Minnesota.

Q. Without going through all of the transitions from that time until the present, will you state what is the area [413] which was within the jurisdiction of the Spokane Chapter—for the purpose of my questioning, whenever I refer to Spokane Chapter, I will be referring to the Heavy Highway and Engineering Chapter—

A. Yes, sir.

Q. —rather than the Building Trades, what was the area of that jurisdiction in 1955 and 1956?

(Testimony of Sam C. Guess.)

A. The 120th Meridian on the west and the Idaho-Montana line on the east, with the Columbia River, that is, in the state of Washington, and the northern half of Idaho County with a boundary line in Idaho.

Q. And did that area include the county known as Benton? A. Yes, sir; it did.

Q. Mr. Guess, are you familiar with an area partially within Benton County known as Hanford Works? A. I am.

Q. Or Hanford Atomic Products Operations, I think it is known as sometimes? A. I am.

Q. Are you also familiar, Mr. Guess, with a document that has been referred to as the Hanford Works Agreement?

A. I have read portions of the Hanford Works Agreement, yes, sir.

Q. Have you had a copy of the contract in your possession?

A. I have since I came into the A.G.C. [414]

Mr. DeGarmo: Will you mark that as an exhibit?

The Clerk: That is the Plaintiff's 6, your Honor.

Q. (By Mr. DeGarmo): I am handing you, Mr. Guess, that which has been marked as Plaintiff's Exhibit 6 for identification. Will you examine it and first just state generally what it is, if you know?

A. This is the construction and collective bargaining agreements of the Hanford Works, State of Washington.

(Testimony of Sam C. Guess.)

Q. And is this the document popularly referred to as the Hanford Works Agreement?

A. It is.

(Exhibit 6 handed to defense counsel.)

Mr. DeGarmo: I might say that I don't expect counsel in a short period of time here to examine that rather voluminous document entirely, and I am perfectly willing that it go in under the reservation that he may check it later and if he finds it does not conform, he can state his objection at that time.

The Court: Very well. I assume that there is no objection if it is an authentic copy?

Mr. Etter: If it is an authentic copy, we have no objection. It appears to be what we have.

The Court: Beg your pardon?

Mr. Etter: It appears to be what we have. [415]

The Court: You may check it. I will provisionally admit it, with the understanding you may check its accuracy.

Mr. DeGarmo: Yes, sir.

Mr. Carey: What is the date of that?

Mr. DeGarmo: It is the 1952 agreement. It purports to be entered into on the 29th day of September, 1952, effective on all work covered as of October, and remain in effect until January 1, 1954, and then from year to year thereafter, subject to termination provisions.

(Whereupon, the said document was admitted in evidence as Plaintiff's Exhibit No. 6.)

(Testimony of Sam C. Guess.)

The Court: May I see that?

(Exhibit handed to Court.)

This, Mr. DeGarmo, I take it, is a form of contract; that is, it isn't any particular signed contract?

Mr. DeGarmo: Yes; I don't think that is a signed contract, that is a form of a contract. I think counsel will agree with me that the way this thing was handled there, that they had a preliminary statement which was applicable to all trades and then there were addendums attached to it for the various crafts and each of the crafts signed the addendums and there were some [416] differences in terms with regard to the separate crafts.

Mr. Etter: That seems to be substantially correct, your Honor.

The Court: Yes, I notice the addendum is signed here. There are copies of what purport to be signatures on the addendum but not on the main contract itself.

Q. (By Mr. DeGarmo): Mr. Guess, will you state if Morrison-Knudsen Company, Incorporated, is a member of the Associated General Contractors of America, Spokane Chapter?

A. Morrison-Knudsen is a member of the Spokane Chapter.

Q. And when, if you can tell us, did it become such a member? A. February of 1955.

Q. Mr. Guess, in certain of the testimony which has preceded yours, reference has been made to the

(Testimony of Sam C. Guess.)

subject of the furnishing of the transportation at Richland. Are you familiar with that particular practice or custom, or whatever it may have been, which was in existence there?

A. Yes; I am familiar with it and the history of it.

Q. Will you tell us what first is meant by the term "transportation" as you understand it? [417]

A. The transporting of personnel, of the crafts, working for the contractor from the parking area outside of the barrier into the work site; the furnishing of bus or vehicular transportation for those individual craftsmen.

Q. Now, I wish to ask you, Mr. Guess, if the furnishing of such transportation, to your knowledge, is provided for by either the A.G.C. agreement, and I am referring now to either the 1952-'55 agreement or the '56 to '58 agreement, with the Teamsters or the Operating Engineers, or by the Hanford Works Agreement, which is the last document here?

A. To my knowledge, neither the A.G.C. or the Hanford Works Agreement provides for the furnishing of transportation.

The Court: Neither one, you say?

A. Neither one.

The Court: The main entrance into the reservation is through North Richland, isn't it?

A. Yes, sir.

The Court: Although there is one up—

(Testimony of Sam C. Guess.)

A. Yakima side.

The Court: ——from Yakima down?

A. Yes, sir.

The Court: But most of the workmen go in through the North Richland barrier, do they not?

A. That is correct. [418]

The Court: And the workmen do not drive their own private cars into the barrier into the area, as a rule, do they?

A. They do at the present time.

The Court: They do now. Did they at the time involved here?

A. The workmen coming in from North Richland, 40 per cent of them were riding the busses at that time, and all of those people coming in from Yakima and Sunnyside were coming in their private cars.

The Court: And the busses went through this barrier and delivered the workmen inside?

A. Those that rode the busses were going through the north barrier.

The Court: Of course, the area in there is quite large, isn't it?

A. Yes, sir.

The Court: About how far is it from the North Richland entrance up to the Moxee entrance? Is that 20 miles or more?

A. It is in excess of 35.

The Court: Oh, I see. Yes, all right.

Q. (By Mr. DeGarmo): The testimony which

(Testimony of Sam C. Guess.)

you have just given in response to the Court's questions, Mr. Guess, did that relate both to the years '55 and '56 up until [419] the time of the work stoppage at Richland?

A. The A.G.C. agreement has never furnished bus transportation either in 1950 to '55 or '56 to '58, and, to my knowledge, the Hanford Agreement has never stipulated the furnishing of transportation.

Q. No; I am asking about the workers driving their private cars into the area—by the area, I am referring to the restricted area—did that apply both to '55 and '56?

A. Mr. DeGarmo, to my knowledge, it didn't become completely clear to me until the strike period of last year just what transportation conditions were behind the barrier.

Q. Well, your testimony is you are not in a position to state that?

A. I am not in a position to state.

Q. As to the '55? A. As to the '55.

Q. But are you able to state as to what the condition was immediately preceding the time when the strike took place?

A. There was a survey made and a report given to me that immediately prior to the strike, that 40 per cent of the people were using busses and 60 per cent of the people were not using busses going behind the barrier.

Q. Now, was that 40 and 60 of those entering from the North Richland entrance or 40 and 60 per

(Testimony of Sam C. Guess.)

cent of the entire [420] working population within the area?

A. That was in the entire working population.

The Court: Did your survey cover construction and maintenance people both, or just construction?

A. Just construction.

The Court: Just construction.

Q. (By Mr. DeGarmo): As of the fall of 1955, Mr. Guess, can you state what contractor members of the A.G.C., Spokane Chapter, were engaged in construction work in the Hanford Works Area?

A. To my knowledge, the Sound Construction Company was the only contracting firm that was working behind the barrier when I first came to work for the A.G.C.

The Court: I didn't get your date, Mr. DeGarmo.

Mr. DeGarmo: I asked as of the fall of 1955.

The Court: All right, thank you.

Mr. Etter: The answer isn't quite responsive.

A. No; it is not.

Mr. DeGarmo: No; it is not.

Q. Can you tell us what the situation was in the fall of 1955 and before Morrison-Knudsen Company entered the area as a contractor?

A. I have no knowledge that any Spokane Chapter member was working behind the barrier at that time.

Q. Were there contractors working within the area at that [421] time?

(Testimony of Sam C. Guess.)

A. There were contractors working behind the barrier at that time.

Q. And is that from your personal knowledge?

A. That is.

Q. Can you name some of them who were working within the barrier at that time and who were not members of the A.G.C.?

A. The—let's see—I would like to make a correction in my statement, Mr. DeGarmo. The J. A. Jones Company had become a member of the Spokane Chapter during 1955. The companies that I know that were working back of the barrier were the Lewis Hopkins Company, who is not a member; the L. H. Hoffman Company, who is not a member. I do not have knowledge of any other firms working back there.

Q. Now, Mr. Guess, in the fall of 1955, did it come to your knowledge or attention that there was a possibility, let's put it, that the Hanford Works Agreement might not be continued beyond the end of that year?

A. That is correct. On September the 21st, Mr. Ken McCaffree, who was the Executive Secretary of the Hanford Negotiating Committee, came to Spokane and had lunch with the chairman of the labor committee of the Spokane Chapter, one member of the labor committee, [422] and myself, and at that time he told us——

Q. I don't wish you to repeat hearsay testimony, Mr. Guess. It was from Mr. McCaffree that you obtained the information?

(Testimony of Sam C. Guess.)

A. That is correct, sir.

Q. At some time later in the year of 1955, did you receive any information that the contract was to be terminated, as differentiated from the previous information which was merely a possibility?

A. I received a carbon copy of a letter dated December 29th in which it announced the intention of the negotiating committee to terminate their then existing agreement.

Mr. DeGarmo: May I have the court file for a moment, please?

The Court: Yes.

Q. (By Mr. DeGarmo): Calling your attention, Mr. Guess, to a document which is attached to the Plaintiff's Requests for Admission under Rule 36 as Exhibit F, I wish to ask you if that is the copy of the document that you stated you received through the mail? A. That is, sir.

Mr. DeGarmo: May I have now Plaintiff's 2 and 3?

(Exhibits handed to Mr. DeGarmo.)

Q. Mr. Guess, I am handing you Plaintiff's Exhibit 2 and ask [423] you if you are familiar with that document? A. I am, sir.

Q. Did you participate in the negotiation of the document? A. I did.

Q. And was that a document which was in effect as of January 1st of 1956? A. It was.

Q. And, likewise, I am handing you Plaintiff's Exhibit 3 and ask you if you are familiar with that

(Testimony of Sam C. Guess.)

document? A. I am.

Q. Did you also participate in the negotiation of that document? A. I did, sir.

Q. And was it a document which was in effect on the same date of January 1, 1956?

A. Yes, sir.

Q. All right, now, after you had received the copy of the letter to which you have referred and which indicated that the Hanford Works Agreement was terminated as of December 31st, 1955, will you state first if you did anything as the Executive Secretary of the Associated General Contractors, Spokane Chapter, in connection with the application of the documents, Exhibits 2 and 3, that is, the Teamsters' agreement and the Operating Engineers' agreement to the Hanford Works [424] Area?

A. The preliminary negotiations on documents 2 and 3 in the fall of 1955 started out——

Q. Well, now, I don't care what the preliminary negotiations were; I want to know what you did after January 1st of 1956, when you learned that the Hanford Works Agreement was terminated?

A. The labor committee met in Spokane and discussed the putting into effect——

Mr. Etter: Just a moment. Is this in the presence of any of these defendants?

Mr. DeGarmo: I was just going to ask what labor committee he was referring to.

A. The Spokane Chapter labor committee.

Q. That is the labor committee of the Spokane

(Testimony of Sam C. Guess.)

Chapter of the A.G.C.? A. Correct.

Q. There were no representatives of either the Teamsters or Operating Engineers?

A. No, sir.

Q. All right, I only want you to tell us what you did insofar as you had direct contact with representatives of the Teamsters and the Operating Engineers after January 1st of 1956, when you had learned that the Hanford Works Agreement was terminated?

A. We had a meeting in my office, at which time the [425] agreements were discussed.

Q. What was the date of the meeting, if you can give it, and who were present?

A. As regards the putting into force and effect of the Teamsters agreement that had just been negotiated. One of the men present was Mr. Gene Whitney, business agent of the local chapter—or local Teamsters, and Mr. Sewell Davis of the Pasco, and at that time Mr. Davis complained that a lot of their people were going to be hurt——

Mr. Carey: Just a moment, your Honor. Counsel asked the witness to fix the date of that meeting and he never did fix it.

A. It was in the early part of January and I believe it was before January the 8th, the exact date of which I do not know.

The Court: 1956?

A. 1956.

Q. (By Mr. DeGarmo): All right, now, tell us what occurred at that meeting.

(Testimony of Sam C. Guess.)

A. We told Mr. Davis at that time that we were prepared, under the terms of our agreement, to sit down and talk a hardship case with anybody that was hurt, and that we had expressed during negotiations the idea and the mutual consent that we would sit down and talk hardship [426] in the event somebody desired to talk hardship, and Mr. Davis said that he felt that his people were going to be hurt. And they went ahead in the agreement. Although not completely printed and proofread, the agreement went into printing shortly after that. Although the original document, negotiated between the A.G.C. and the Teamsters had been signed in my office on December the 19th, we had not had a printed copy and the proofs were not read until after this meeting with Mr. Sewell Davis, and so we went ahead and had those copies printed and they withdrew their objection and he went back to Pasco.

Q. All right, now, were there any further negotiations with either the Teamsters or the Operating Engineers relating to the carrying into effect of the A.G.C. agreement, and I am talking about Exhibits 2 and 3, in the Hanford Works Area after January 1st?

A. Mr. DeGarmo, it is very difficult to answer that specific yes or no question or to delineate it, the putting into effect of our agreement, and since the termination of the Hanford Agreement, there were many questions that had arisen. We talked several times about it, and on March the 1st, when Mr.

(Testimony of Sam C. Guess.)

Knack was in Spokane, we had representatives——

Q. Go ahead. [427]

A. ——we had representatives of the labor organizations, the Operating Engineers and the Teamsters, in my office, and part of the negotiations or part of the conversations that day was the discussion on Chief Joseph Dam and what happened at the expiration of the special job agreement, and then we had a discussion on what was going to happen or what was happening at Hanford, and Mr. George Seabeck of the Spokane Chapter asked the question, “Does the job agreement exist when a project is completed or does the project agreement continue as long as a job is going regardless of conditions?” and it was agreed by all hands present that when a project was completed, that the job agreement died, and because of the urging of the A.E.C. staff, Mr. Henry Thurston in particular, the Spokane Chapter and the contractors working behind the barrier did nothing to upset the conditions because of the very critical nature of the work going on back there, and we had hoped for an orderly transition during that period of time when the contractors could get into full swing and into effect with the contracts as exhibited in 2 and 3.

Q. Now, did you have any other meetings after March 1st, and I want only meetings at which there were present representatives of the Teamsters or the Operating [428] Engineers, and if they were not both there I wish you would tell us?

(Testimony of Sam C. Guess.)

A. On the morning of March 10th the representatives of the Operating Engineers and the Teamsters convened with members of the negotiating committee of both the Spokane Chapter and the Eastern Washington Builders Chapter of A.G.C., at which time the conditions and contract that existed at the Hanford site were present and took part in the discussion. In addition to members of the Operating Engineers and the Teamsters, there were two representatives of the Atomic Energy Commission present and Mr. Louis Zeman, of the Federal Mediation and Conciliation Service, and the chairman of the labor committee of the Spokane Chapter asked the various parties as to what their status was and what they believed the situation to be and each person had an opportunity to express themselves.

Q. Mr. Guess, what question was raised at any of these meetings that you have mentioned now, the one of March 1st, the one of March 10th, as to whether the A.G.C. agreements, Exhibits 2 and 3, were to be effective? What was the area of discussion, in other words?

A. The area of discussion was the effect of the amount of take-home pay and which would possibly be changed by the going under the Spokane Chapter's agreement. [429]

Q. Well, in what particular respects would it have been changed?

A. Well, it would require—if the agreement at Hanford or the conditions under which Hanford had been working under were terminated and the people

(Testimony of Sam C. Guess.)

were no longer paid isolation pay and were no longer furnished bus transportation, it would require that they accept as part of their remuneration the travel pay negotiated under agreements 2 and 3, and it would be that they would furnish their own transportation rather than being furnished transportation by the contractor at the job, and they felt that to eliminate one or the other would make some difference in the amount of money that a man could take home. In other words, he would have to buy gasoline and oil, whereas he had been furnished transportation in the past.

Q. All right, now, were any other meetings held after March 10th?

A. Yes, sir, another meeting was held on March the 16th. Let me correct, sir. I believe the next—let's see—the next meeting at which there were present Teamsters, Engineers, and Cement Masons, representatives of the Spokane Chapter of A.G.C., representatives of the Building Chapter of the A.G.C., representatives of the Hanford Atomic Works, and the Mediation Service, was [430] held on March the 16th in the Federal Courtroom at Spokane.

Q. In Spokane. What occurred?

A. Courthouse, excuse me.

Q. You were present? A. I was present.

Q. What occurred at that meeting?

A. Mr. Zeman, the Federal Mediation Service, opened the meeting by calling upon Mr. Rossman, who summarized the situation, stating that the old

(Testimony of Sam C. Guess.)

Hanford Agreement was terminated by the contractors at Hanford and that other crafts had settled for the Area agreements and these crafts which had settled were stated to have equal or better travel pay considerations on the outside than on the project, and that the Teamsters and Engineers would now lose money if they accepted the agreement, the Area agreement, on the project, and the Hanford contractors had made the proposition of canceling the agreement and cutting off the busses and it had been talked about during negotiations at A.G.C., and he acknowledged that the A.G.C. labor committees had proposed a special hardship condition and that the proposal had been taken to the people at his monthly meetings and that they had voted against it.

Q. This was Mr. Rossman? [431]

A. That was Mr. Rossman. And he stated what their demands were and they were demanding a continuation of the isolation pay, plus the busses and plus the fringe benefits given under the A.G.C Area agreement.

Q. Were these demands being made notwithstanding the Area agreements which were then in effect?

A. That is correct, sir.

And then the second person called upon by Mr. Zeman was Mr. Sewell Davis, who stated—

Q. He was in the Teamsters?

A. He was the Teamsters' business agent, local 839, and he stated that he had taken the proposition that we had made to the meeting of March the 10th back to his people and that 65 members had voted

(Testimony of Sam C. Guess.)

against the proposition and that 3 had voted to accept it, and the membership didn't instruct Mr. Davis on any proposal, but he thought that they wanted more or less the same thing that they have—or had had under the Hanford Works Agreement, plus all the benefits of the A.G.C. agreement.

Q. Now, you have mentioned twice in your testimony some proposal that had been made on behalf of the A.G.C. and its members to the Teamsters and Operating Engineers as the result of the March 10th meeting. Can you tell us what that proposal was? [432]

A. We offered that all new work and all employees hired after March the 12th by the construction contractors at Hanford would be covered by the A.G.C. agreements.

The second part of the proposal was that the Operating Engineers and Teamsters on the roll of the contractors presently performing work on the project prior to March 12th would receive a daily travel allowance of \$2.62½ until such contracts were completed, that is, the presently existing work down there, and then on January the 1st, 1957, the Teamsters and Operating Engineers would receive a \$2.00 travel allowance.

It was this agreement—or this proposition that was made and which was turned down.

Q. Would that have meant some modification of the Exhibits 2 and 3?

A. That would have, sir. We were prepared to make, if it wanted to be added under a Schedule B

(Testimony of Sam C. Guess.)

or letter memorandum or memorandum of understanding, some kind of an agreement. We were willing to make concessions down there at that time.

Q. And do I understand that that proposal was turned down by both the Teamsters and the Operating Engineers at the meeting on the 19th, was it, or 16th?

A. That is correct. Reported back to us on March 16th that [433] the members had turned it down.

Q. All right, now, what further was done in an effort to keep this situation from blowing up?

A. We requested that the contractors presently working at the Hanford Works continue to pay the isolation pay and the busses and furnish busses to the personnel until such time as an agreement could be reached.

Q. All right, what did you do in a further endeavor to reach some agreement, and again I am referring to only direct contacts had by you with the two unions with which we are interested, the Teamsters and the Operating Engineers or their representatives?

A. We offered to arbitrate under the disputes clause of the agreements reached in Exhibits 2 and 3, and we were told that the members present could not give us an answer at that time.

Q. Now, let's find out what meeting that was that offer was made and who were present, if possible?

A. That offer was made on March 16th, at which time Mr. Al Crowder of the Teamsters, Mr. Sewell

(Testimony of Sam C. Guess.)

Davis of the Teamsters, Arthur Rossman of the Engineers, R. Davis of the Engineers, B. C. Fulton of the Engineers, William Dunn of the Engineers, R. L. Hollingsworth, Engineers; Charlie Knapp, Cement Masons; Max Sather, Carl Carbon, George Sebeck, Al Halvorson, Cham Helvey, [434] Sam Guess, and Mr. Mack Reynolds for management, and Mr. McCaffree—he was the Executive Secretary—Mr. Bacon, Mr. Rutt, Messrs. Peterson and Zeman of the Federal Mediation and Conciliation Service.

Q. You say that was an offer to arbitrate?

A. That was an offer to arbitrate.

Q. And what response, if any, did you get to that offer?

A. We were told by Mr. Davis of the Teamsters that he would have to clear through his legal department in Seattle before he could go further on arbitration.

We were told by Mr. Rossman that he wanted an opportunity to consult legal counsel.

Q. And when, approximately, was that information given to you?

A. It was given to us during the afternoon of March 16. It was—Mr. Davis made his statement between the time of 12:47 and 3:45, and Mr. Rossman made his statement—let's see—before 12. Exactly the time, I don't know.

Q. Now, at some later date, did you receive a definite word from either of these gentlemen or from representatives of their organizations as to the request that they arbitrate under the arbitration provisions of the A.G.C. agreements?

(Testimony of Sam C. Guess.)

A. On March the 21st, another meeting in mediation, attended by both Mr. Peterson and Mr. Zeman, Mr. Zeman [435] doing most of the mediation, was held, and at that time Mr. Rossman of the Engineers, Mr. Bill Dunn, Mr. Sewell Davis, Mr. Charlie Knapp, were present. Management was represented by Mr. Sather, Mr. Helvey, Mr. Carbon, Mr. McReynolds, and Mr. Guess.

Q. What occurred at that time?

A. Mr. Davis stated that he had not been able to talk to his attorney, Mr. Sam Bassett, and that they had talked to one of the assistants, and the Teamsters refused to arbitrate the issues at Hanford because of several reasons. He stated one of the reasons was that it was doubtful that it is legal for a new agreement to be arbitrated.

Mr. Rossman stated that he had thoroughly talked it over with his attorney and, because management had transferred their bargaining rights, it did not necessarily establish the Area agreement on the project, and since the Hanford contractors have negotiated the area agreements for a number of years, he felt that they should continue to do so, although in the face of admitting that the Hanford Area agreement had been cancelled.

Q. Well, now, after the refusal of both the unions to arbitrate as to some arrangement, what was done?

A. A great deal of discussion took place during the [436] remainder of the morning and, after a caucus or a luncheon break, the full meeting re-

(Testimony of Sam C. Guess.)

sumed and the chairman of the Spokane Chapter, Mr. Sather, stated that he felt that we had made labor a fair proposition and that they should take the matter back to their people and they should go to the A.G.C. agreements and arbitrate their grievances, with the understanding that any benefits given by the arbitrator would be retroactive to the time that the arbitration began. Mr. Rossman stated of necessity he must take it back to his people, and Mr. Davis stated that, "I think you have a work stoppage on your hands. Our people will not work."

And it was again asked that if they didn't think it was a fair thing, to arbitrate the matter, and Mr. Davis answered, "No, that would be the simplest thing in the world to me. These people told us that they are just not going out there when the busses are off." And it was after that that the meeting was adjourned. Mr. Zeman made the closing remarks, a very brief summary, and the meeting came to a complete impasse and was adjourned.

Q. Was anything said at that meeting as to when the absolute terms of the A.G.C. agreement would be made effective there?

Mr. Carey: May I have that question read again? [437]

(Question read.)

A. It was stated several times during the meeting that there was no other agreement under which people could work; that a considerable number of the local unions had gone under Area agreements,

(Testimony of Sam C. Guess.)

the Hanford Works Agreement had been terminated, and for that reason they would either work under the A.G.C. agreement or there was no agreement to work under, and we had the feeling——

Q. (By Mr. DeGarmo): Well, now, Mr. Guess, I don't want you to give your impression.

Mr. Etter: Just let him continue.

Mr. DeGarmo: I am perfectly willing, if you want it.

Mr. Etter: He said a couple of interesting things, I don't mind him continuing there.

Q. (By Mr. DeGarmo): All right, Mr. Guess, go ahead.

The Court: I think we should keep within the rules of evidence here, not express feelings.

Mr. DeGarmo: I thought I was being proper, I didn't intend to be out of line.

Q. What occurred there then after this meeting? You say that the meeting of March 21st ended in an impasse; what occurred then?

A. There were no busses on the job the next day, and, to my [438] knowledge, no one but—well, the crafts involved did not work, Mr. DeGarmo. I understand that through telephone conversations with the area, with Mr. Thurston of the A.E.C. and with the project manager on the job.

Q. You weren't down there?

A. I was not down there the following day.

Q. All right, I don't want you to testify what you don't know.

(Testimony of Sam C. Guess.)

The Court: What was the date of this when you saw you couldn't agree?

A. The 21st was the impasse.

The Court: March?

A. March 21st.

Q. (By Mr. DeGarmo): Are you familiar personally with the fact that there was a work stoppage at the Hanford Works Area subsequent to March 21st?

A. I was not on the project and I only know what was reported to me from the project, that there was no work in progress.

Q. Well, you have participated in several meetings since then, have you not, Mr. Guess, at which the fact of the work stoppage was one of the questions that was discussed? A. I have, sir.

Q. Including the Ching panel hearing? [439]

A. After a considerable amount of discussion, negotiations back and forth, appeals to all of the Internationals concerned to put the people back on the job, we were instructed by the Atomic Energy Commission to accept the Ching panel as a mediation service to get the work started again, and after several days of negotiations, we finally had the Ching panel out here and the people went back to work after that.

Q. Now, you have mentioned in your testimony, Mr. Guess, in several instances the presence at some of these meetings of representatives of the Federal Mediation Service? A. That's right, sir.

(Testimony of Sam C. Guess.)

Q. Can you state for us on what basis or how these people came to be present at these meetings?

A. Before the meeting on March the 10th, I had a conversation with Mr. Zeman, explained to him the conditions which had arisen at Hanford, invited him to sit in as an observer at that time. Mr. Zeman accepted the invitation and during this meeting he stated that he had not been officially ordered in but he was there as an observer and to offer his assistance and the assistance of his office, anything he could do to help get the situation straightened out.

Q. Well, the thing I wanted to make clear, Mr. Guess, up [440] until the 21st of March, was the Federal Mediation and Conciliation Service actually and officially in the picture there in connection with negotiations?

A. They came into the picture originally on March the 16th, when Mr. Peterson came to Spokane.

Q. Now, at whose instance, if you know, did he arrive?

A. Mr. Peterson did not tell me when he called me from Seattle requesting this meeting be set up. He did not tell me specifically who had asked him in.

Q. Did the Associated General Contractors, Spokane Chapter, request him to intervene?

A. We did not, sir.

Q. And at the subsequent meetings, then, they were not there at your instigation by your—I mean the A.G.C., Spokane Chapter?

(Testimony of Sam C. Guess.)

A. They were not there at the A.G.C.'s instigation.

Q. I want to go back just a minute, Mr. Guess. Was there any inter-relationship—I do not mean contractually; I mean as far as terms or phraseology or wages, working conditions—between the A.G.C. Area agreements and the Hanford Works Agreement? A. Will you restate that?

Q. Was there any inter-relationship in any way between the A.G.C. agreements—I am referring now to the agreements negotiated through the Spokane Chapter—and the [441] so-called Hanford Works Agreement as far as wages or working conditions were concerned?

A. The Spokane Chapter of A.G.C., together with the Eastern Washington Builders Chapter of A.G.C., negotiated all of the wages arrived at with the basic crafts in the Inland Empire in the year in which we cover. It has always been a time lag of thirty days between the time of completion of negotiations between Spokane and the unions and the adoption of the wages at the Hanford Project. It has been the avowed and announced intention of the government, through the Atomic Energy Commission, not to set the wage pattern but to follow, and for that reason there was a time lag delay.

Q. Well, then, were the wages which were established by the A.G.C. for the various crafts the same wages which were provided for in the Hanford Works Agreement?

(Testimony of Sam C. Guess.)

A. To the best of my knowledge, that is the case, they always adopted our wage rates.

Q. Now, there were in the Hanford Works agreements some special conditions, such as isolation pay and travel and such things, that were not in the A.G.C. agreement, is that correct?

A. There was no isolation pay in the A.G.C. agreement; there was no travel pay in the A.G.C. agreement until January 1, [442] 1956.

Q. And do I understand that the provisions of Exhibits 2 and 3, which are here, relating to travel and which contain these two maps showing areas in which travel pay shall be applicable, were new in the 1956-58 agreements? A. That is correct.

Q. They were not in the previous agreement, which has been introduced in evidence here as Defendants' Exhibit No. 4?

A. There was no travel provision or no travel map there.

Q. Mr. Guess, in the continuation after January 1st of 1956 and during the period of these negotiations which you have testified to of the isolation pay and bus transportation, which had been in effect under the Hanford Works Agreement, what conflict, if any, was there in the continuation of those practices and the observance of the A.G.C. agreements?

A. To continue the isolation pay under the Hanford agreement would have been direct conflict, because it would have meant a separate job agreement. The furnishing of busses is something that the contractors have never entered into, desired very

(Testimony of Sam C. Guess.)

strongly, because of all of the ramifications of getting everybody into a bus and furnishing busses. They desired never to enter into any arrangement for furnishing transportation or busses, [443] and it was in the agreement to furnish, to pay a man on a zone basis for traveling and he had to travel in his own conveyance.

Q. Were the payments, which were continued pending negotiations attempting to arrive at some satisfactory solution of the application of the agreements to the Hanford Works, were they amounts in addition to that which were provided for under the A.G.C. agreements?

A. They were in addition to that, but at that time, no one to my knowledge was paying our regular travel time as provided in the travel pay, provided in our agreements. They were paying isolation pay and furnishing busses outside of our agreement.

Q. Well, was that a greater amount than they would have been required to pay if they had followed the A.G.C. agreements? A. It was, sir.

Q. So that it was something above and beyond, rather than subtracting from?

A. That is correct, sir.

Q. Why were those payments continued during that period of time, Mr. Guess?

A. In an effort not to upset the labor conditions at Hanford and to stop work. We had been told that if we were to stop them, that there would be a work stoppage. [444]

Q. Who told you that?

(Testimony of Sam C. Guess.)

A. The business agents of the local unions, the Operating Engineers and the Teamsters.

Q. And when you did stop them, what occurred?

A. A work stoppage occurred.

Q. Mr. Guess, have you had an opportunity and occasion to examine the provisions of the contract between Morrison-Knudsen Company and the Atomic Energy Commission, copy of which is here in evidence as Exhibit 1?

A. I very briefly read over the contract at one time.

Q. Are you familiar with the nature of the work which is provided for under the contract?

A. In detail, sir.

Q. I ask you, Mr. Guess, whether the work which is provided for there is work within the jurisdiction of the A.G.C. Chapter, Spokane Branch, of the Heavy and Highway Engineering?

A. It is within the Engineering scope of the work. In other words, in the original charter of the A.G.C. which we were given, Engineering work is described as pumping plants, and this was for a pumping plant addition.

Mr. DeGarmo: Pardon me just one moment, your Honor.

The Court: All right.

Q. (By Mr. DeGarmo): Mr. Guess, during the same period that [445] we are talking about here of January 1, 1956, to March 22nd, 1956, were there, to your knowledge, any contractors working on the

(Testimony of Sam C. Guess.)

Hanford Works Project under the so-called Area Agreements or A.G.C. agreements?

A. There were certain works being carried on on the project for the Corps of Engineers, Walla Walla District, and those people working for contractors under the Corps of Engineers were working under the area agreements.

Q. And was that within this same Hanford Works Area?

A. Behind the barrier within the Works Area.

Mr. DeGarmo: You may examine.

Cross-Examination

By Mr. Etter:

Q. Start from the last question. The agreements that were in existence with the Corps of Engineers were not A.E.C., were they?

Mr. DeGarmo: I think that question answers itself.

Mr. Etter: Well, I just want to make the distinction, if I am permitted to do so, counsel.

A. No, sir, Corps of Engineer contracts and A.E.C. contracts are not the same, no.

Q. (By Mr. Etter:) They are not the [446] same?

A. No.

Q. These were direct contracts between the Corps of Engineers and contractors who were members of A.G.C.?

A. That's right.

Q. They were not contracts, for instance, that

(Testimony of Sam C. Guess.)

were let by A.E.C. subject to conditions that A.E.C. imposed as to contractors in their area, isn't that correct? A. That is correct.

Q. Now, Mr. Guess, these documents, this Hanford Area Agreement, I assume, that has been placed in evidence has come in as part of the records that you maintain as the secretary of the A.G.C., is that correct? A. That is correct.

Q. Now, you have had a chance, have you not, since you have been there to see and to examine A.G.C. agreements that I have here?

A. I have not seen nor examined those, to my knowledge.

Q. You have not? A. No, sir.

Q. You have never had any occasion to examine any A.G.C. agreements beyond a couple of years after you came there, is that it?

A. I had occasion to work with the agreement that was written in 1950 and changed yearly thereafter, and that is the only copy of the agreement. I believe that [447] is the blue copy sitting on the desk there.

Q. So as to these agreements, you have never seen any of them before?

A. Not to my knowledge.

Q. I see. And you don't know whether there are any copies of them in your official files?

A. I have never seen a copy in my office, Mr. Etter.

Q. Mr. Warn was your predecessor?

A. That is correct, sir.

(Testimony of Sam C. Guess.)

Q. And he has no file of these contracts that you know of, sir?

A. Mr. Warn practically cleaned the entire office before I went in.

Q. I see.

A. So far as historical records are concerned, I have practically nothing.

Q. And you are referring to a contract of '49 as an historical record, I assume?

A. Yes, sir.

Q. Now, M-K, as I understand it, became a member of the Chapter in February of 1955?

A. Correct, sir.

Q. And you, having been employed in some capacity for A.G.C., it came to your knowledge that there was a furnishing of transportation inside the barricade of [448] the work site and isolation pay in the Hanford Works Agreement?

A. Correct.

Q. And you were aware of that, were you not?

A. Correct.

Q. Now, as I understand it, there never was any time that there was any similar provisions in any of the A.G.C. contracts that had been negotiated over the area which you described as being within your jurisdiction; that is, conditions such as I have mentioned, that is, isolation pay or transportation by busses?

A. There was neither transportation or isolation pay in any A.G.C. contract up to 1956.

Q. No. And during a period of time from 1950

(Testimony of Sam C. Guess.)

to 1955, there was no such provision in the A.G.C. agreements, a copy of which I have placed in evidence? A. No.

Q. During that time, however, from 1952, at least, to 1955, there were such provisions made at the Hanford Works?

A. I understand that the provision of isolation pay was a portion of the written contract and that the furnishing of busses was a usage that had grown up there.

Q. That is correct. That existed during the same time as your contract or the contract that is in there extending from 50-55 was in existence? [449]

A. That is correct.

Q. And at that time during the period from 1950 to 1955, were any contractors who were members of your Chapter doing work within the Hanford Area?

A. As I stated, the Sound Construction Company was doing work when I first went to work for A.G.C. They were a member but did not pay any dues into the Spokane Chapter while I was employed, after I came to work. Their name was on the list, but it evidently was a carry-over.

The J. A. Jones Company did join the Chapter during 1955, so those two organizations were working there.

Working on the project, the Murphy Brothers Construction Company, but they were doing work as a subcontractor for another contractor on the base.

(Testimony of Sam C. Guess.)

Q. There were subcontractors during that period of time working on the Hanford Area who were members of your Chapter, were there not, 1950 to 1955?

A. Murphy Brothers Construction Company is the only subcontractor that I remember down there.

Q. I see. Now, when they were working on that project, was the provision made for their employees to receive isolation pay and transportation?

A. No, sir. They were working for another firm on an Army [450] camp site.

Q. An Army camp site? A. Right.

Q. Not an A.E.C. contract?

A. Not an A.E.C. contract.

Q. When J. A. Jones was working, were they working under an A.E.C. contract?

A. They were working under an A.E.C. on the main amount of construction.

Q. And is it not a fact that they were paying isolation pay and they were providing bus transportation? A. They were.

Q. They were? A. Yes, sir.

Q. Although they were a member of your Chapter?

A. They joined, as I say, latterly in that period.

Q. Well, as I understand, you said they were on before that and then you qualified it and said you hadn't got any dues but carried them on the list until they rejoined in 1955; isn't that right?

A. I received one payment from them, yes, sir.

Q. I see. Now, as I gather, then, in 1955, the

(Testimony of Sam C. Guess.)

only two contractors who were doing work within the Hanford Area who were members of your Chapter were the two companies that you have mentioned; in other words, the plaintiff in [451] this action and the J. A. Jones Company, is that right? A. Right.

Q. Do you know how many other contractors were then performing work on the Hanford Project at the time? A. I do not.

Q. Beg your pardon? A. I do not.

Q. Well, do you know whether there were any others?

A. Yes, I do know that there were others from newspaper accounts, from conversations with people on the Project.

Q. There were numerous contractors, isn't that right, that were working down there from '50 to '55? A. Right.

Q. Beg your pardon? A. That is correct.

Q. That is correct. And there were other contractors working there and the only two who were members of your Chapter were these two, the plaintiff and J. A. Jones?

A. To the best of my knowledge, Mr. Etter, that is all.

Q. That's right. Now, when did negotiations commence between your Chapter and these two unions—I am referring specifically to the Teamsters 839 and 370 of the Operating Engineers; when did negotiations start [452] preceding the

(Testimony of Sam C. Guess.)

December 31st termination date set out in the exhibit which is in evidence, the five-year contract?

A. Negotiations with the Teamsters Union were begun on October the 6th, 1955, and with the Operating Engineers they were begun 9:30 a.m., Wednesday, October the 19th.

Q. Of nineteen—— A. 1955.

Q. ——fifty-five. And those negotiations continued, did they not, up until the contracts were signed, that is, the contracts of November—I think November 24th, or is it December?

Mr. DeGarmo: It is December.

Q. (By Mr. Etter): December 19, 1955, and December 24th. Those are the dates, are they not, that the contracts were signed, respectively, with the Engineers—or, rather, the Teamsters—the earlier date, the Engineers the latter date?

A. That is correct, sir.

Q. Now, as I understand it, prior to the time that you had received any notice in October, and I understand that your contracts, if they do not so provide, at least the Labor-Management Relations Act did, for a sixty-day notice, is that correct?

A. That is correct, the contracts provided for a sixty-day opener. [453]

Q. A sixty-day opener. Now, prior to the time that you had received any opener notice from either the Teamsters or the Engineers, you had a visit from this fellow McCaffree, as I understand it? You said September, I assume that is prior to October?

(Testimony of Sam C. Guess.)

A. September the 21st was the date that Mr. McCaffree came to Spokane.

Q. And who was McCaffree?

A. He was Executive Secretary of the Hanford Negotiating Committee.

Q. He was the Executive Secretary of the Hanford Contractors Negotiating Committee?

A. That's right.

Q. Is that correct? A. That is correct.

Q. And you had a visit from him in September and I think you said that he told you there was a possibility that those contracts down there were going to terminate? A. That is correct, sir.

Q. Well, what did he say there? Can you tell me just about how it was that he told you about this? How did it come up? Did you bring it up or did he?

A. Mr. McCaffree, on September the 21st, informed representatives of the Spokane Chapter that "There is a possibility that the Hanford Area Agreements will be [454] dropped."

Q. Well, did Mr. McCaffree write you a letter telling you he would be at the meeting and wanting to talk with you people?

A. No, sir. I had telephone conversations with Mr. McCaffree prior to his arrival in Spokane.

Q. Oh, I see. And when was the first one that you had?

A. I do not have the date of the telephone conversation.

Q. And did it have to do with these contracts, with his contracting parties and with your Chapter? Was that the subject matter of his conversation?

(Testimony of Sam C. Guess.)

A. I don't quite understand that one, Mr. Etter.

Q. He was representing a group at Hanford and you were representing a group that were writing contracts in Eastern Washington. Now, what was it he first called you about down there? Was it something to do with your respective contractual relationships, or what?

A. He called me and he said that he would like to talk to the labor committee of the Spokane Chapter of A.G.C.

Q. I see.

A. And asked me to arrange a meeting with those people.

Q. All right, so he came up and you had this meeting with him and he told you there was a possibility that those contracts would come to an end or would be terminated, or something like [455] that?

A. That's right.

Q. And thereafter when you commenced your negotiations with the Engineers and the Teamsters, Mr. Rossman and the other gentlemen, you, of course, knew that they were working on the Hanford Project and were working under the Hanford Agreement with respect to their union members who were in that area, is that correct?

A. That is correct.

Q. And you knew that Mr. Rossman's Engineers and the Teamsters were receiving isolation pay and bus transportation, did you not?

A. That is correct.

Q. That is correct. And you also knew that they

(Testimony of Sam C. Guess.)

were parties to the contract with the Hanford contractors negotiating committee, did you not?

A. That is correct.

Q. Beg your pardon?

A. That is correct.

Q. All right. Now, having that in mind and having Mr. McCaffree's statement to you of a possible termination, did you say anything to Mr. Rossman about Mr. McCaffree's visit to you?

Mr. DeGarmo: Just a minute, if your Honor please. I wish to object to that question upon the ground that it is an attempt by these parties to go [456] behind the ruling of the Court to show the negotiations of the parties with respect to this agreement, tend to show what the parties intended.

Mr. Etter: I haven't gone behind the agreement or attempted to vary the terms of it. I am trying to inquire of this man how they came to an agreement first, if I may.

The Court: Well, all right, go ahead. Overruled.

Mr. DeGarmo: I just want the record to show my objection.

The Court: Yes, the record will show it.

Mr. DeGarmo: So I won't be held to a waiver of objection.

Mr. Etter: Yes.

Mr. DeGarmo: Yes, because I can see where he is going very clearly and I am sure he can, too.

Mr. Etter: Well, why don't you wait and see if I get there.

Mr. Carey: Your Honor having overruled the

(Testimony of Sam C. Guess.)

objection, I suppose it calls for no comment from me.

The Court: No, that's right. I might change my mind.

Mr. Carey: Okay.

Q. (By Mr. Etter): Well, in any event, you didn't say [457] anything to these two men that you had talked to McCaffree and that you had wind of a cancellation of this contract, did you?

A. We had a good bit of conversation about Hanford and the various conditions which were down there and we talked on travel pay, which we anticipated that we would get for the first time, and particular reference was made to the payment of isolation pay, the fact that security regulations were more stringent on the area than any other place. We also agreed, and Mr. Rossman made the opening statement, that he would like to rewrite the contract in order that it cover the large jobs, as well as the regular jobs, and the answer from Mr. Murrow, who was at that time acting as chairman of the committee, was that we recognize that we had an agreement that was five years old and needed re-writing, and for that reason we had opened the agreement this year earlier than normal in order to have time to write and to boil down an agreement that would suit all the conditions in our area. The timing and the schedule at which the Hanford Negotiating Committee might terminate their contract was very much in doubt. It could have been anywhere up to a year in termination, but since we

(Testimony of Sam C. Guess.)

didn't know exactly when or under what conditions the agreement would be terminated, we didn't reach any conclusion at [458] any one meeting that we were talking there.

Q. Are you concluded? A. I am.

Q. Now will you answer the question whether or not you advised Mr. Rossman or the representatives of the Teamsters that you had had a visit from Mr. McCaffree and had determined there was a possibility of the termination of the Hanford Agreement?

A. Mr. Etter, that I am not sure.

Q. All right. But you do say that you didn't know when this termination would take place; it might take place in a year? A. That's right.

Q. And I gathered from that, consequently, all you had from Mr. McCaffree was a very general idea of the possibility of a termination, from what you say?

A. A number of possibilities or time schedules were discussed and the very definite conclusion was reached by the negotiating committee for the Spokane Chapter that we would make an effort to secure as many members on the Hanford Project as we could and that we would be ready to handle any situation that came up.

The Court: Court will recess for 10 minutes.

(Short recess.)

Q. (By Mr. Etter): Can we reasonably assume,

(Testimony of Sam C. Guess.)

Mr. Guess, that [459] you didn't have any definite idea about a time of termination, actually?

A. That is correct.

Q. After this September meeting, did you have an opportunity to talk with Mr. McCaffree again, do you recall, prior to the time of the notice which he sent?

A. I talked again with Mr. McCaffree in my office on September 24th.

Q. On the 24th? A. Yes, sir.

Q. Just the one question: After that conference, was there a termination date or a time of termination still indefinite?

A. It was still indefinite at that time.

Q. I assume that with respect to that, you didn't know whether it was going to be four months or five, or whatever it might be, before it was terminated?

A. We did not know the schedule in which it was to be terminated.

Q. Did not know the schedule. Then you entered into these contracts with the Teamsters on the 19th of December and the Engineers on the 24th of December, is that correct?

A. Engineers, I believe it was the 29th.

Q. The contract that is attached here says the 24th. A. All right. [460]

Q. I call your attention to it.

Mr. DeGarmo: I will stipulate it is the 24th.

Mr. Etter: The 24th, yes. The 19th and 24th, all right.

(Testimony of Sam C. Guess.)

Q. To be effective on the 1st, I gather?

A. January 1st, right.

Q. And then it was on the 29th you received a copy of the termination notice which Mr. McCaffree had dispatched on behalf of the Hanford Contractors Negotiating Committee on the 28th of December of 1956 to the respective defendants here?

A. I received a copy of that.

Q. You received a copy of that? A. Right.

Q. And it was only at that time, I gather, that you knew what the effective date of termination was? A. May I add in there, Mr. Etter—

Q. Certainly.

A. —that during this time between September the 21st or the 24th, whichever it might be, the labor committee of the Spokane Chapter went down to Hanford, at which time we again talked of the possible termination of the Hanford Agreement. There were many things down on the Hanford Project with which our committee members were not familiar. I believe that at that time I had more of [461] a knowledge because of my very frequent conversations with the A.E.C. staff and with Mr. McCaffree of conditions down there, because I wanted my people to be better educated and to have a greater knowledge of conditions at Hanford, and we went down and talked with a group of the contractors and the staff members of A.E.C. who had to do with labor relations.

At that time, we were still not given or not sure of an exact schedule of termination. The statement

(Testimony of Sam C. Guess.)

was made several times that at any time that the termination was made, that they wanted to make it as harmonious as possible, and that in order that we promote that harmony, the members of the Spokane Chapter went back with the intent of doing anything they could and proposed a hardship clause to our agreements that in the event anybody was hurt, that we would sit down and discuss with them and iron out the problems of transition.

Q. Was that prior to the date of the termination?

A. That was prior to the date of the termination of the contract.

Q. You so advised these unions that you were talking with? A. Yes, sir.

Q. All right. Now, after you received the notice of termination, or copy of the notice of termination, you were still negotiating with the unions, were you? [462]

A. Mr. Etter, you very infrequently get out of negotiations with the unions, you are talking to them about one matter or another all of the time.

Q. The answer is, then, yes, you were still——

A. We were still negotiating, right.

Q. At the same time, were you aware of the fact that the unions were still negotiating with the Hanford Contractors Committee?

A. I was told by Mr. Rossman that he was going to Hanford on one occasion. That is the only information that I had on that.

Q. Well, you knew, did you or did you not, through the first couple of months of 1956 that the

(Testimony of Sam C. Guess.)

Hanford Contractors Negotiating Committee was also submitting proposals for the contract agreement with the interested unions?

A. I do not know that they were submitting proposals.

Q. But haven't you ever seen any of the proposals or the copies of the proposals that were being submitted to the unions during the same time you were negotiating with them by Mr. McCaffree?

A. I have read quite a few documents from Hanford that were written during that period of time, the exact nature of which I couldn't recall right now, but I do know that—let's see—I believe that any statement that I would [463] make in regard to any documents would be not founded on too good of information.

Q. Well, I will just ask you if you have ever seen any of these documents or proposals or are familiar with them at all, by conversation with Mr. McCaffree or otherwise?

A. I had a copy of this document and it came to me after or during the time in which we went to the panel. I also received—let's see—I did receive a copy of this document at some time. I don't remember seeing this copy here.

Q. I see. But at least based on these other two, you were aware that some negotiations, the extent of which you are not familiar with in their entirety, were going on between the Hanford Committee and the interested unions?

(Testimony of Sam C. Guess.)

Mr. DeGarmo: Pardon me, just a minute, Mr. Guess.

I wish at this time, if your Honor please, to interpose an objection to this question upon the ground that I am unable at this moment to see any materiality to the examination which is now being conducted.

I am in a very difficult position, in that counsel has never stated to the Court in response to the Court's question, nor have they indicated by pleadings, just what their defense is in this case, and I have great difficulty in determining what is material [464] and what is immaterial since I don't know what they consider as their defense.

They are asking now about occurrences which took place between the Hanford Contractors Negotiating Committee, assuming that there was such an organization, and some representatives of the unions after January 1st of 1956. It is admitted by requests for admission in this case that the Hanford Works Agreement had ended as of January 1st, 1956, and it is further admitted that no other agreement ever came into existence after that other than the A.G.C. agreements which we have here, and unless counsel can point out—I request the Court to ask counsel to point out what the materiality of this examination is. I just can't determine exactly on what to base my objection, except as I now see it and understand the issues as framed by the pleadings, there is no materiality.

Mr. Etter: In the first place, I might say to your Honor it is preliminary, and if counsel will just give

(Testimony of Sam C. Guess.)

me a chance, I will show him what I am talking about. It won't prejudice him in any way if he wants to strike it and it isn't material.

Mr. DeGarmo: I think I am entitled to know what the issues are in this case at some stage. We are now almost at the close of the plaintiff's case and I [465] still don't know what the defense is in this case.

Mr. Etter: I am not going to argue with counsel about it except to say that it is illustrative of counsel's confusion about the issues, if he wants to put it that way.

He asked this witness, in the first place, if he were familiar with the transportation and the isolation pay situation at Hanford, and when the witness says "yes," then he says, "Give us a history of it." I don't know what he closed off to my examination when he asked this man to give a history of the whole bargaining down there at Hanford, and he asked it himself, I didn't ask it.

Mr. DeGarmo: I didn't ask it in those words.

Mr. Etter: You asked that question.

Mr. DeGarmo: No, sir.

Mr. Carey: I request the reporter to locate that in his record.

Mr. DeGarmo: All right, we are talking now about a question that relates to January 1st, to March of 1956; we are not talking about any historical matter. My objection goes to this question which has to do with some negotiations of a Hanford Contractors Negotiating Committee at a time when

(Testimony of Sam C. Guess.)

it is admitted by the pleadings there was no contract in effect and that none was ever [466] consummated.

Mr. Etter: Well, to shorten it up, I will tell you just what I am after, then you can make your objection.

My position will be, if Mr. Guess admits that he recognizes there were some negotiations going on between the Hanford Committee, that he later and his Chapter later and on the 8th of March advised the defendant Unions here that the bargaining rights of the Hanford Negotiating Committee had been assigned to them and that they therefore would bargain with the Unions for the Hanford Negotiating Committee.

Now, is that plain?

Mr. DeGarmo: Well, so what?

Mr. Etter: What do you mean, "So what?"

Mr. DeGarmo: Let's assume that that is true; still, what has it to do with this case, when we are suing for a breach of contract and the contract is here?

Let's assume that everything Mr. Etter says is true. I think that isn't exactly what happened, but let's assume that the contract——

Mr. Etter: Well, now, you aren't sworn yet. I said I was going to show it.

The Court: Go ahead, finish your statement. [467]

Mr. DeGarmo: I am not questioning your veracity at all, I am just saying that let's assume that everything Mr. Etter says is true, that the rights of bargaining were assigned to this Chapter;

(Testimony of Sam C. Guess.)

we still have the admission here that no contract was ever consummated at Hanford other than the one which we have here as Exhibits 2 and 3. Now, of what probative value can that fact have as bearing upon whether there was a breach of these two contracts? These are the only contracts that they plead or that anybody has plead or that anybody claims were in existence at that time.

Mr. Etter: Now, your Honor, Mr. DeGarmo writes a letter, a lengthy letter, which is, of course, the first written notice anybody ever had he was claiming a breach, and he makes sure to say this:

“As you must be aware, Morrison-Knudsen, Inc., is now, and has been at all times material to any issue with you, a member of and represented as to bargaining rights by the Associated General Contractors of America.”

He has emphasized here that they had the full authority to do all the negotiating and anything that was material to them was vested in these people.

Now, saying that if these people accepted the [468] rights of negotiation of the Hanford Negotiating Committee and that in negotiating with these Unions they correspondingly represented the interests of both that committee and of Morrison-Knudsen, that that isn't binding on him, is that what the point is that he makes in view of his own letter?

Mr. DeGarmo: Well, let's assume that it is.

Mr. Etter: That they had no authority to do one thing, but they had it to do the other?

Mr. DeGarmo: Let's assume that it is. I am not

(Testimony of Sam C. Guess.)

agreeing to what he says, but let's assume that it is true.

Mr. Etter: Well, you wrote the letter.

Mr. DeGarmo: Yes, I wrote the letter.

Mr. Etter: Whether you agree with it or not.

Mr. DeGarmo: Let's assume that it is true and let's assume that they were negotiating; the fact is, and the only fact in this case that there can be no question about, is that there were only two agreements in effect, No. 2 and No. 3, and that is admitted. They admit that no other agreement was ever consummated; therefore, there can't be any other agreement than this.

Now, what can the value of the evidence be except to extend the record?

Mr. Etter: There might be quite a bit of [469] argument in here as to when this agreement became effective after we hear what he has to say.

Mr. DeGarmo: What is the defense in this case?

Mr. Etter: And that has plenty to do with whether or not there is a breach.

The Court: I don't want to cut defendants off from any legitimate defense they may have here, but so far as the Court is concerned, if I may use the expression, it is unclear to me just where all this is leading. It would be more helpful to me if I knew just what you maintain here, as to whether there was another contract that they were operating on rather than these two here, or was there no contract, or this one didn't become operative or it wasn't

(Testimony of Sam C. Guess.)

breached, or do you claim all of those things? What is it?

Mr. Etter: We claim this contract wasn't breached.

The Court: Well, a lot of this testimony, I fail to see the materiality of it as to whether or not there was a breach of these contracts.

Mr. Etter: Your Honor, what you say now I will agree might be ordinarily appropriate if the examination of Mr. Guess had consisted of a very brief proof of things, but I didn't invite counsel to open up the history of all the bargaining. He went into every [470] meeting that was had and what everybody said at every meeting on March so and so and through all of his records. Now I fail to understand why I am restricted to inquire about that to see whether——

The Court: Well, assuming what you say is true, after all, the Court has the responsibility of directing the lawsuit——

Mr. Etter: That's right.

The Court: ——and of keeping it within bounds and within somewhere near the issues that are to be decided. Suppose that Mr. DeGarmo, I am not saying that he would do so, but supposing he has a witness testify about Columbus' discovery of America and what vessels he used, and so on; must I then let opposing counsel go into all the history?

Mr. Etter: I hardly think so.

The Court: Of the expedition, if it has nothing to do with this lawsuit. If he strays off, it doesn't give

(Testimony of Sam C. Guess.)

you the right to do so. If he opens up something that isn't directly material, that doesn't mean that I must let opposing counsel exhaust the other side.

Mr. Etter: I will get right to one thing quickly, because I might as well find out if I am able to use this, your Honor. [471]

Q. Now, you testified to a meeting that you had with these people on the 10th of March of 1956, in which you stated certain things occurred; do you recall that? A. I do.

Q. Now, do you recall submitting that proposal in that language to the Unions at that time?

The Court: What time is this, now?

Mr. Etter: March the 10th.

The Court: Oh.

Mr. Etter: Of 1956.

Mr. DeGarmo: Might I request, if your Honor please, that the document which counsel has handed the witness be marked as an exhibit for identification in order that the record will show what it is he is looking at?

Mr. Etter: Gladly.

The Court: Yes, I think it should be marked. Otherwise, the record won't show what document we are dealing with here.

That will be defendants'—

The Clerk: Defendants' 7, your Honor.

The Court: Seven?

The Clerk: Yes, your Honor, 7.

Q. (By Mr. Etter): I will ask you if that isn't a copy of a document which you prepared and sub-

(Testimony of Sam C. Guess.)

mitted to Mr. [472] Rossman at that meeting of the 10th day of March to which you made reference?

A. This is a copy of the proposal as finally drafted and submitted to the Operating Engineers and the Teamsters.

Q. Is that correct? A. That is correct.

Mr. Carey: What is the date of it, please?

The Court: March 10th.

Mr. Etter: March 10th, 1956.

The Court: Show it to counsel.

Mr. DeGarmo: Yes, I have seen this, Mr. Etter.

Mr. Etter: Have you?

The Witness: Mr. Etter——

Mr. Etter: Just a moment.

Mr. DeGarmo: I have no objection if they are offering the document.

Mr. Etter: Yes, I am offering it.

The Court: All right, it will be admitted, then, Exhibit 7.

(Whereupon, the said document was admitted in evidence as Defendants' Exhibit No. 7.)

Q. (By Mr. Etter): You proposed here what you refer to as an addendum to existing A.G.C. agreements as follows:

“Effective March 12, 1956, the provisions of [473] A.G.C. agreements will apply on the Hanford Project on all A.E.C. contracts, with the following exceptions * * *”

Is that correct?

A. That is correct.

(Testimony of Sam C. Guess.)

Q. Now, you were making that proposal on behalf of the plaintiff?

A. Making that proposal on behalf of all members of A.G.C.

Q. Well, were you making it on behalf of the plaintiff, specifically?

A. Morrison-Knudsen Company was a member of the A.G.C.

Q. Well, I think that is a very simple question, Mr. Guess: Were you making the proposal on behalf of the plaintiff, Morrison-Knudsen?

Mr. DeGarmo: I submit that the witness has answered the question in the only way it can be answered.

The Court: That was March the 10th, what date?

Mr. DeGarmo: '56.

Mr. Etter: 1956.

The Court: Oh, yes. Well, he said he was making it in behalf of all members.

Mr. DeGarmo: And that Morrison-Knudsen Company was a member.

The Court: Yes, I think what the witness doesn't want to say is he was acting solely and [474] specifically and particularly for Morrison-Knudsen any more than any other member of his organization. Is that what you mean to say?

A. That is correct, sir.

The Court: All right.

Q. (By Mr. Etter): The only proposal you could make on behalf of your members as affecting the Hanford Project was the plaintiff, Morrison-

(Testimony of Sam C. Guess.)

Knudsen, and Jones? They were the only two you had there, is that correct?

A. That is correct.

Q. You mentioned that there was a discussion of the matter of the existing conditions under the Hanford Agreement of bus transportation, is that the fact, and you also stated the proposal that you advanced at one of the meetings in March?

A. One of the meetings in March we made a proposal, yes.

Q. And that proposal was incorporated as a \$2.00 in lieu of transportation proposal?

A. The proposal that you have just submitted was that a travel allowance of \$2.62 a day be paid.

Q. The original contract provided for \$2.00, did it not?

A. The original proposal had made \$2.00 and \$4.00, with 50 per cent to go into effect in 1956 and 75 per cent to go into effect in 1957 and 100 per cent in 1958.

Q. Yes. And the proposal was, of course, that that would [475] provide that the employee would drive his own car from the bus depot through the barricade, isn't that right, behind the barricade?

A. That's right, he would drive it from his home, Mr. Etter.

Q. From his home, I see.

A. To the site of work.

Q. Yes. Previously, the bus transportation had been given from the bus depot, had it not?

(Testimony of Sam C. Guess.)

A. The bus parking area just outside of the barrier, yes.

Q. Yes. And that was a distance ranging from 30 to 60 miles, I gather?

A. I don't have a map and I do not have the distances.

Q. Depending upon the area of work?

A. Depending on where the man came from, I believe that the figure of 57 miles is the maximum over-all distance that could be traveled.

Q. 57 miles? A. Was in my mind.

Q. And prior to that time, the argument with the Unions was that they were brought to the transportation area and then were transported in, isn't that correct?

A. The men came under their own power, under their own conveyances, up to the parking lot, and then they were transported out there.

Q. And your proposal on the transportation was a substitute [476] for the isolation pay, is that not correct, also?

A. We didn't make it as a substitute for the isolation pay, Mr. Etter.

Q. But you made it with the provision that the isolation pay would be abolished?

A. That is correct.

Q. That is correct. And the Unions' position was that under the existing agreement, that in abolishing it, they would not only lose their pay, that is, their isolation pay, but then would have the additional expense of 10 cents per mile that they claimed

(Testimony of Sam C. Guess.)

would be for this distance of 58 miles or less; that was their argument, wasn't it?

A. Their argument was that they didn't want to take home less take-home pay than they had been used to.

Q. Yes. In other words, it was just an argument between your group and the Unions as to which was the beneficial thing, the existing agreement they had under which they were working at Hanford and the one that you were proposing at that time?

A. That was basically the argument.

Mr. DeGarmo: I want, if your Honor please, to show an objection to the question that Mr. Etter just asked upon the ground it assumes a fact which is contrary to the record in this case. He says the agreement they [477] had. They had no agreement at that time and so stated in the record.

Q. (By Mr. Etter): Well, let's put it this way: The proposal that you made was countered by them with the statement that they were then working under at least an extension of existing conditions—let's put it that way—that provided these things that I have mentioned to you?

A. Will you state that again?

Q. Counsel objected to my use of terms, so I am saying that what they said was they were in better shape the way they were at the present time than to accept that proposal.

A. We made the proposition to them on March the 10th and it was taken back to their members and they made a counter-proposal.

(Testimony of Sam C. Guess.)

The Court: I think I understand the factual basis of the situation. I am not misled by Mr. Etter's question. Go ahead.

Mr. DeGarmo: I didn't think your Honor would be, really.

Mr. Etter: Beg your pardon?

The Court: I say I think I understand the factual basis with reference to the contract.

Mr. Etter: Well, I won't ask it if your Honor [478] understands what it is.

Q. Now, when these agreements were entered into with the Engineers and the Teamsters on the 19th and the 24th of December, respectively, as I gather it at that time there were two members of A.G.C. who had construction work on the Hanford Project, is that correct? A. That is correct.

Q. And during negotiations up until that time, that is, in '55, and through this period when you entered into these two agreements, could you tell me how many employers or contractors there were at various times that are known to you, at least, that were working on the Hanford Project other than the two contractors that belonged to your Chapter?

A. I have answered that question before, Mr. Etter. I do not know how many contractors were working there.

Q. Oh. Would there be 20?

A. I do not know.

Q. Well, at the time that you were conducting

(Testimony of Sam C. Guess.)

these negotiations that led up to the signing of these two agreements, do you recall that there were some discussions that you people had in which the Unions raised the objection or asked you what would happen if they signed your contracts with all of the other contractors who were on the Project and who were not members of A.G.C.? [479]

Mr. DeGarmo: Just a minute. Could I ask the reporter to read that question back?

(Question read.)

Mr. DeGarmo: I wished to be sure that his question related to negotiations, and on the basis of that question, I object to it on the ground that it is incompetent, irrelevant and immaterial, and contrary to the ruling of the Court with respect to the affirmative defense as dealing with negotiations leading up to the signing of the contract.

The Court: I will sustain the objection. I think it is.

Q. (By Mr. Etter): Now, in this exhibit, Plaintiff's Exhibit No. 6, handing you Plaintiff's Exhibit No. 6 and directing your attention to Article 4, when did you become familiar with this Hanford Agreement? You said this came into your possession and I was wondering——

A. Sometime during the first year.

Q. Of '54?

A. I believe it was in '54 that it first came to my attention, and I didn't have a complete copy of it

(Testimony of Sam C. Guess.)

that first year, and the second year I asked for and received a copy of the agreement.

Q. I see.

A. Now, I can check that by finding out what the latest [480] date is on there. There appears to be no date.

Q. But you were familiar with it in 1954?

A. I was familiar with the document itself; as to the contents, I was not.

Q. Well, when did you become familiar with any of the contents?

A. After we got into the discussions of the Hanford Works Area.

Q. When was that, now, what year?

A. In 1955.

Q. When in 1955?

A. Beginning in September is when I started digging, really digging into the proposition.

Q. Beginning in September? A. Yes, sir.

Q. Now, it refers here to an Exhibit 1. You notice it refers here to work covered, the agreement as to work covered refers to Exhibit 1. Can you find Exhibit 1 offhand, Sam?

(Witness Complies.)

Q. That is indicated as Exhibit 1, is it, of the Hanford Works area covered by this agreement, I imagine? A. That is correct.

Q. I see. And you understood it to be such, of course?

(Testimony of Sam C. Guess.)

A. The first time that I ever saw this map, although I had [481] the document in my possession, was yesterday afternoon.

Q. Was yesterday afternoon?

A. Yes, sir. But I have seen many maps of the Benton and Franklin County areas, Adams and Grant.

Q. I see. And although this document was in your possession, you had never seen this?

A. Not consciously, I have never seen it.

Q. Taking in part of Franklin County and part of Benton County and the Hanford Works?

A. I have not consciously seen this map prior to yesterday.

Q. I see. Now, however, you had been familiar with this agreement of 1950 and 1955 marked Defendants' Exhibit 4, had you not?

A. That is correct.

Q. And with Article 1, "this agreement shall cover so and so," and then starting in here, "Spokane, Adams, Whitman, Benton, Franklin, Walla Walla, Asotin, Columbia," and so on?

A. That is correct.

Q. You were familiar with all of that?

A. Yes, sir.

Q. And during this time in 1950 and 1955 for four or five years that you had this Benton County included here, you were familiar in '54, at least, with the operations of Hanford and the Hanford Engineering Works, were you not? [482]

A. That is correct.

(Testimony of Sam C. Guess.)

Q. And that, too, is true, is it not, of the same clauses that appear here in Plaintiff's Exhibits 2 and 3; in other words, the description of the counties is the same, Whitman, Benton, Franklin?

A. That is correct.

Q. I mean it is exactly the same language in all three? I think one gentleman testified to that yesterday.

A. There is two distinct—or one very distinct difference between this contract and the contract which is in the blue cover, and that is that under the Article 9, Section 3, the Operating Engineers, it says there shall be no special job agreements.

Q. Yes, no special job agreements. Have you an understanding of what that meant?

A. I do. [483]

* * *

Mr. Etter: May we have a continuance until morning? It is 4:30, your Honor.

The Court: Yes, all right, we will adjourn until tomorrow morning at 11. I have some other matters that will take about an hour tomorrow, so we will adjourn until tomorrow morning at 11 o'clock.

(Whereupon, the trial in the instant cause was adjourned until 11 o'clock a.m. Wednesday, June 12, 1957.) [491]

2 o'Clock P.M. Wednesday, June 12, 1957

(Whereupon, the trial in the instant cause was resumed pursuant to adjournment at 4:30 p.m., June 11, 1957, all parties being present as before, and the following proceedings were had:) [493]

* * *

The Court: Before we proceed here, let me say again that I don't wish to retract anything that I said yesterday, although it was near the tag end of the day and even the judges lose their patience sometimes, although they never should, I suppose, but I certainly [496] don't wish to deprive anyone of a defense they may have here, and within reason and if it can be done in fairness to the plaintiff, I think that the issues should be determined upon the evidence rather than upon too critical a construction of the pleadings. I don't wish counsel to keep trying to come in the back door and circumvent the Court's ruling by putting in testimony that applies only to that affirmative defense which has been stricken. However, if in the facts that can be shown here, the documents and the things that these people did, and, to some extent, the things that they said to each other in their conferences, if it appears that even though this contract was made which by its terms applied to the Tri-City area, I think, as a part of Benton County, that if, as a matter of fact, they didn't, the plaintiff didn't proceed under this labor contract which had been negotiated for them and a number of others by this association in Spokane,

if they didn't in fact do that but in fact proceeded under some informal extension of the area agreement, why, I would regard that as a defense and I don't want to preclude you from putting it in.

I had this feeling about it, that perhaps an undue amount of time was being taken on that theory of the case, that there wasn't an application of this [497] contract or use of it or that there wasn't a breach, that so far as that phase of it is concerned, I may be wrong, but it seems to me that there isn't really as much factual conflict as might appear or difference between the parties as might appear from the lengthy cross-examinations that have been made here. I think that this lawsuit mostly is going to be decided upon the documentary evidence, what the parties did, and, as I say, to some extent, what they said to each other in their conferences, although anybody who has had any experience in lawsuits knows that, as juries are instructed, you have to take with caution and a grain of salt somebody's construction of what was said in a conference, a lengthy conference, what Joe said and what Bill said and what somebody else said, particularly when it is controverted. It is a very slippery ground upon which to base important findings, so that the main thing, I think, is the documentary evidence and what was done here and the general background as shown by the evidence.

Now, I hope that may be of some assistance, I don't know. You may proceed. [498]



